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In the Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,
Petitioners,
v.

RICHARD P. NORDAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a far-reaching decision of enormous practical importance to the nation's unfolding military effort in Iraq and Afghanistan, the Fourth Circuit has exposed U.S. civilian contractors carrying on their Defense Department-mandated operations in hostile territory to the destabilizing reach of fifty state tort systems in this country. In remanding this closely-watched case to the state courts of North Carolina, the court of appeals deepened a circuit conflict going to the fundamental power of federal courts to adjudicate — through dismissal — actions that by their nature are exclusively federal. By so doing, the Fourth Circuit has relegated civilian contractors serving in profoundly dangerous circumstances to the vagaries of a Balkanized regime of conflicting legal systems among the several States. Indeed, the state court has already commenced proceedings in this action, permitting respondents to proceed with discovery relating to U.S. military operations and planning. The Court should grant certiorari on the questions presented below, or, alternatively, call for the views of the Solicitor General on these questions, which have far-reaching implications for the nation.

The questions presented are two:

1. Whether a federal district court that lacks subject-matter jurisdiction over a removed action must dismiss rather than remand the action when the state court also lacks jurisdiction.

2. Whether a court of appeals has jurisdiction to review a district court's remand order notwithstanding 28 U.S.C. § 1447(d) when the remand order would circumvent federal statutory and federal constitutional designs to preclude state court jurisdiction.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners Blackwater Security Consulting, LLC and Blackwater Lodge and Training Center, Inc.; and Respondent Richard P. Nordan.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that Blackwater Security Consulting, LLC, and Blackwater Lodge and Training Center, Inc., are wholly-owned subsidiaries of The Prince Group. No publicly-held company owns 10% or more of the stock of any of the foregoing entities.

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The opinion of the court of appeals is reported at 460 F.3d 576 and is reprinted in the Appendix at App. 1a-32a. The opinion of the district court is reported at 382 F. Supp. 2d 801 and is reprinted in the Appendix at App. 33a-57a.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2006. A timely-filed petition for rehearing and suggestion for rehearing en banc was denied on September 28, 2006. App. 58a-60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Defense Base Act, 42 U.S.C. § 1651 *et seq.* ("DBA"), is reprinted in its entirety in the Appendix beginning at App. 61a.

42 U.S.C. § 1651(c) provides, in pertinent part:

Liability as exclusive. The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

10 U.S.C. § 802(a)(10) provides:

The following persons are subject to this chapter: ... In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

28 U.S.C. § 1441(a) provides, in pertinent part:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(f) provides:

The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1442(a)(1) provides, in pertinent part:

A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1447(c) provides, in pertinent part:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(d) provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

1. Petitioners are United States military contractors carrying out profoundly dangerous missions in various theaters of battle, including in Iraq and Afghanistan. In faithfully discharging their duties under contracts with the U.S. Department of Defense, petitioners' contract personnel daily enter wildly unpredictable, deeply menacing physical environments.[1] Lives are sometimes lost in that danger-filled zone of contractual duty. These contract-mandated functions are, by their very nature, utterly and completely federal. There is no room for introducing the vagaries of state tort law in determining the nature and scope of a contractor's duty to its employees, who heroically volunteer

[1] U.S. military doctrine provides that "[t]he Department[of Defense]'s Total Force — its active and reserve military components, its civil servants, and its contractors — constitutes its warfighting capability and capacity." Since contractors are part of the nation's war-fighting force, "[t]he Department's policy now directs that performance of commercial activities by contractors, including contingency contractors and any proposed contractor logistics support arrangements, shall be included in operational plans and orders."

for these extraordinarily dangerous assignments. Yet, the Fourth Circuit has done exactly that. In this highly controversial decision, the court of appeals has relegated petitioners — and myriad federal contractors serving in Iraq and Afghanistan — to the tort law of the several States when, as here and as so frequently happens in times of war, tragedy strikes. This Court's intervention is urgently needed to vouchsafe the federal integrity of the Total Force structure of the United States military — a carefully fashioned organizational arrangement authorized by Congress and implemented by the Executive Branch as the most expeditious strategy for carrying out the nation's enormously challenging missions. War-risk liability exposure (particularly if its contours must be defined by the tort laws of the fifty States) is inherently unknowable and uninsurable, and thus incompatible with this Total Force policy, which provides for a war-fighting capability that includes commercial contractors. Under the regime left standing by the Fourth Circuit, a state court in Raleigh will determine whether — on the streets of Fallujah — decedents were properly armed and commanded. This simply cannot be.

At a barebones minimum, this Court should not let the Fourth Circuit's destabilizing judgment stand without seeking the guidance of the United States.

2. On March 31, 2004, Iraqi insurgents in Fallujah, Iraq, killed four Americans working for Petitioner Blackwater Security Consulting, LLC. An Iraqi mob beat and set fire to their bodies, and hung some of their remains from a bridge. The four decedents were accompanying a truck convoy bound for U.S. Army Camp Ridgeway. App. 4a.

3. Pursuant to the federal workers' compensation program that Congress created as an exclusive remedy to be administered by the U.S. Department of Labor, *see* 42 U.S.C. § 1651(c) (liability under the Defense Base Act ("DBA")

"shall be exclusive and in place of all other liability"); *id.* §§ 1653(a)-(b) (providing for U.S. Department of Labor administration of DBA benefits and providing for federal judicial review), decedents' DBA beneficiaries applied for — and have been receiving — maximum-rate benefits under the DBA. The U.S. Department of Labor has entered a final compensation order finding that one decedent (Zovko) is covered by, and entitled to benefits under, the DBA, and has entered a preliminary finding that a second decedent (Teague) is likewise entitled to DBA benefits. Respondents' counsel, who represents the DBA beneficiaries in agency proceedings as well, has refused to consent to the formal conclusion of agency proceedings as to the other two decedents.

4. On January 5, 2005, plaintiff Richard P. Nordan, in his capacity as administrator for the four decedents' estates, filed a complaint in North Carolina state court claiming that Petitioners Blackwater Security Consulting, LLC, Blackwater Lodge and Training Center, Inc., and Justin L. McQuown (collectively "Blackwater") had a duty under North Carolina's wrongful death statute, N.C. Gen. Stat. § 28A-18-2, to provide decedents with armored vehicles, intelligence, additional training, planning time, and rear gunners equipped with "SAW Mach 46" heavy automatic weapons. The complaint also seeks rescission, under North Carolina fraud law, of decedents' contracts with Blackwater to support United States military operations overseas. Those contracts contain detailed provisions releasing Blackwater from any and all risk of war liability. App. 36a-39a.

Nordan filed his complaint in the Superior Court for Wake County, North Carolina. App. 33a. Blackwater removed the case, citing 28 U.S.C. § 1441 and 28 U.S.C. § 1331, and asserting that Nordan's state-law claims were completely preempted by the DBA's exclusive remedy. App. 4a. Once in the district court, Blackwater filed a

motion to dismiss on the basis that DBA workers compensation benefits, the exclusive remedy provided by Congress, had been claimed by — and paid for — the four decedents. *Id.* Nordan opposed dismissal and moved to remand. App. 34a.

The district court granted Nordan's motion to remand and denied as moot Blackwater's motion to dismiss. The court held that "the DBA does not completely preempt state law claims" because the statute "provides for the exclusive filing of a claim for wrongful death benefits with the Secretary of Labor, the adjudication of such claims by a deputy commissioner or administrative law judge, the review of claims by the Benefits Review Board, and appellate review by a federal court of appeals," and thus, according to the district court, "United States District Courts are not involved in the claims adjudication process." App. 47a ("'[T]he sine qua non of complete preemption is a pre-existing federal cause of action that can be brought in the district courts.'") (quoting *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005)). Finding a laek of complete preemption, the court held that there was no federal question basis for removal under 28 U.S.C. § 1441. The court acknowledged that under *Shives v. CSX Transportation, Inc. (In re CSX Transp.)*, 151 F.3d 164, 171 (4th Cir. 1998), it would be required to dismiss rather than to remand if the DBA deprived the state court of subject-matter jurisdiction. However, determining that it had no jurisdiction to determine the extent of DBA coverage, the district court declined to reach the issue. App. 56a.

5. Blackwater appealed and petitioned for a writ of mandamus. Nordan moved to dismiss the appeal and the mandamus petition on the grounds that 28 U.S.C. § 1447(d) prohibits review of Section 1447(c) remand orders. Blackwater defended as to the presence of appellate jurisdiction, asserting that the district court based its order of

remand not on its lack of original federal question jurisdiction under Section 1441, but on its finding that it lacked jurisdiction to determine whether the DBA deprives the *state court* of jurisdiction.

The Fourth Circuit dismissed Blackwater's appeal under Section 1447(d) and denied mandamus. App. 32a. The court of appeals acknowledged the exceptions to Section 1447(d) that this Court recognized in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), but concluded that none of those exceptions applied. App. 12a-13a. The court of appeals also recognized that the district court erred in finding that the federal district courts have no role in considering the coverage of the DBA.

The district court incorrectly concluded that the federal district courts play no role in the adjudication of DBA claims. The federal district courts, followed by the federal courts of appeals and the United States Supreme Court, review DBA claims after they have been initially adjudicated in the Department of Labor.

App. 6a n.2. Even so, the court of appeals found that the trial court's conclusion that it lacked jurisdiction to decide the state court's jurisdiction was not reviewable because "[t]he correctness of the district court's jurisdictional analysis is irrelevant under § 1447(d)." App. 25a. The appeals court thus failed to distinguish between the trial court's finding that it lacked original jurisdiction to adjudicate the complaint, and the trial court's subsequent finding that it lacked jurisdiction under the DBA to decide whether the state court had jurisdiction.

In declining review, the court of appeals permitted the state court to decide whether a state tribunal may, through the application of state tort law, regulate the manner in which

United States armed forces supply lines are kept open under enemy fire in a foreign theater of war — even though Congress created an exclusive administrative remedy under the DBA in order to preclude state court jurisdiction over such constitutionally (and militarily) sensitive determinations. The Fourth Circuit recognized the "magnitude of the concerns Blackwater articulates" with respect to the constitutional allocation of foreign affairs and war powers to the United States, but it declined "to graft a new exception onto the already significantly burdened text of § 1447(d)." App. 27a.

Blackwater's concerns — that state court proceedings will impermissibly intrude into areas constitutionally reserved to the federal government — have already been realized. On December 15, 2006, after Blackwater had filed its demand for arbitration, and over Blackwater's objection that the state court lacks subject-matter jurisdiction, the state court granted, in chambers, respondent's request to issue a commission for an out-of-state deposition in this case, and thus proceeded to exercise jurisdiction to permit discovery before Blackwater has had any opportunity to brief, and the court has an opportunity to hear argument on, a motion to dismiss for lack of jurisdiction.

The extraordinary significance of the remand order below is magnified further by federal legislation enacted after the Fourth Circuit's mandate issued. On October 17, 2006, the President approved the National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, which amends the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 802(a)(10), by clarifying that persons subject to the UCMJ include, "[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." That amendment is an exercise of Congress' authority to "make Rules for the Government and Regulation of the land

and naval Forces[,]" U.S. Const. art. I, § 8, cl.14, and to "provide ... for governing such Part of [the Militia] as may be employed in the Service of the United States," *id.* § 8, cl. 16, by consigning cases such as this to military jurisdiction, including court-martials for "culpable negligence" or manslaughter. 10 U.S.C. § 919(b). This reform of UCMJ jurisdiction brings it into harmony with Total Force doctrine — a foreseeable exercise of plenary federal authority within an exclusive federal domain.

By declining to review the trial court's order of remand, and declining to consider whether there were constitutional and statutory bars to remand, the Fourth Circuit's decision confers upon state courts a role in regulating the choice of weapons and other operational decisions made during war; in administering the DBA program; and in imposing tort liability for alleged violations subject to court-martial.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE AN IMPORTANT AND RECURRING QUESTION OF FEDERAL PRACTICE OVER WHICH THE FEDERAL COURTS ARE IN DISARRAY.

1. This case presents an important and recurring question of federal practice. The issue has occasioned two statutory amendments to 28 U.S.C. § 1447, a circuit conflict, and confusion with respect to the basis and vitality of this Court's decisions establishing the derivative-jurisdiction doctrine. Under that familiar doctrine, federal court jurisdiction in removed actions is derivative of state court jurisdiction. *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922) ("The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires

none."); *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated."); *Arizona v. Manypenny*, 451 U.S. 232, 243 n.17 (1981) (same). The result is that where the state court lacked jurisdiction over a case that is removed to federal court, the federal court must dismiss (rather than remand) the case. *See Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. California*, 463 U.S. 1, 24 n.27 (1983) ("[P]recedent involving other statutes granting exclusive jurisdiction to the federal courts suggests that, if such an action were not within the class of cases over which state and federal courts have concurrent jurisdiction, the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits.") (citing *Gen. Inv. Co.*, 260 U.S. at 287-88 (1922), and *Koppers Co. v. Con'l Cas. Co.*, 337 F.2d 499, 501-502 (8th Cir. 1964) (Blackmun, J.)); *see also* 14B Charles Alan Wright, et al., FEDERAL PRACTICE & PROCEDURE § 3722, at p.481 (3d ed. 1998) (under the derivative-jurisdiction doctrine, "the district court would have to dismiss the removed action since the state court's lack of subject matter jurisdiction prevented remand").

Here, the question whether the derivative-jurisdiction doctrine retains its vitality arises in the specific setting of a remand order permitting a state court to exercise war powers. This is extraordinary. Under the regime mandated by the court of appeals, a state court in Raleigh will be called upon to regulate (through North Carolina tort law) combat operations on a foreign battlefield occupied by the United States armed forces, thereby permitting a state court to decide whether persons killed under enemy fire in such an operation are entitled to DBA benefits administered by the U.S. Department of Labor. Indeed, the state trial court only recently directed that discovery should proceed immediately,

by granting plaintiff's request to conduct an out-of-state deposition.

Surely that cannot be. The vehicle for achieving this highly improbable — and federalism-threatening — result was the district court's declining to apply the derivative-jurisdiction doctrine. Instead, the trial court concluded that it lacked jurisdiction to determine whether Congress had stripped the state courts of jurisdiction under the DBA. The court of appeals likewise refused to apply the derivative-jurisdiction doctrine, even though the panel found that the district court erred in its jurisdictional analysis. The remand order thus permits state courts to adjudicate whether the DBA's "Liability as exclusive" provision (42 U.S.C. § 1651(c)) applies, despite Congress's clearly expressed mandate that the U.S. Department of Labor is to be the exclusive forum for resolving DBA coverage disputes in the first instance (followed by federal-court review), and that state courts have no jurisdiction over such disputes.

2. The derivative-jurisdiction doctrine arose in cases similar to this one, namely, where federal law stripped state courts of jurisdiction. In *Lambert*, for example, this Court held that the district court was required to dismiss the action, because Congress had stripped the state courts of jurisdiction by statutorily committing to *federal* court all suits brought to restrain or set aside orders of the Interstate Commerce Commission. 258 U.S. at 382. Similarly, in *General Investment*, this Court concluded that while the district court would have had jurisdiction over the asserted Sherman and Clayton Act claims had they been originally filed in federal court, it properly dismissed the removed case because the state court from which the case was removed had no jurisdiction over claims committed by Congress exclusively to the federal courts. 260 U.S. at 287-88.

3. Application of the derivative-jurisdiction doctrine by the lower courts produced some paradoxical results. As set forth by this Court, the derivative-jurisdiction doctrine required federal courts to dismiss any case where the state court lacked jurisdiction, even if the district court would have had original jurisdiction over the suit. *See* 14B Charles Alan Wright, et al., FEDERAL PRACTICE & PROCEDURE § 3721, at p.305 (3d ed. 1998); *Dep't of Revenue v. Inv. Fin. Mgmt. Co.*, 831 F.2d 790, 792 (8th Cir. 1987) (noting that the doctrine was "frequently criticized").

Congress sought to eliminate such inefficiencies in 1986 and 2002 by enacting and amending 28 U.S.C. § 1441(f). Section 1441(f) now provides:

> The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1441(f).[2]

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[2] Some courts have mistakenly stated that § 1441(f) "abolishes the derivative jurisdiction doctrine[.]" *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 n.3 (9th Cir. 1988). By its plain language, Section 1447(f) abolishes the rationale that district court jurisdiction over removed cases is derivative of state-court jurisdiction, but it says nothing about whether dismissal rather than remand is required when the district court finds that both the district court and the state court lack jurisdiction. Nothing in Section 1441(f) purports to invite state courts to exercise jurisdiction in derogation of other more specific federal statutes, or in areas constitutionally reserved to the United States.

The amendments thus provide that a federal court is not deprived of jurisdiction to hear a case merely because the state court from which it was removed lacked jurisdiction. The amendments do not resolve, however, the question whether the derivative-jurisdiction doctrine continues to apply where *both* the federal court and the state court lack jurisdiction over a removed case. Nor do they resolve whether this Court's decisions in *Lambert* and *General Investment* continue to prescribe dismissal rather than remand in such circumstances because a remand would be "futile." The circuit courts are deeply divided on this question.

a. The Fifth and Ninth Circuits have held that, despite Section 1447(c)'s provision that a case shall be remanded where a district court lacks subject-matter jurisdiction, the district court should *dismiss* an improperly removed case where the state court also lacks jurisdiction. The reason: because remand would be futile. *See Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990). As the Ninth Circuit stated, "[w]e do not believe Congress intended to ignore the interest of efficient use of judicial resources." *Bell*, 922 F.2d at 1424-25. The Second Circuit also has "indicated that [it] might be willing to entertain the futility exception." *Barbara v. NYSE*, 99 F.3d 49, 56 n.4 (2d Cir. 1996); *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 41 (2d Cir. 1991) ("On the other hand, remand might be improper if it would be futile, as it would be if the state court could not exercise jurisdiction over [plaintiff's] claim against [defendant].") (citation omitted).[3]

[3] Indeed, the Fourth Circuit has held that dismissal rather than remand is required where Congress did not intend to delegate to a state court the application of an exclusive federal remedy. *See Shives*, 151 F.3d 164; *see also Borneman v. United States*, 213 F.3d 819 (4th Cir.

b. The Third, Fourth, Sixth, Seventh, and Eleventh Circuits have reached the opposite conclusion. Those circuits have held that 28 U.S.C. § 1447(c) provides no exception for cases where the state court lacks jurisdiction. *See Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 213 (3d Cir. 1997); *Roach v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996); *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 496-97 (6th Cir. 1999); *Schacht v. Wis. Dep't of Corrs.*, 116 F.3d 1151, 1153 (7th Cir. 1997); *Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1139 (7th Cir. 1994); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). These decisions, however, do not consider whether the derivative-jurisdiction doctrine has continuing vitality. Nor do they consider whether Section 1447(c) should be construed harmoniously with other statutes that strip state courts of jurisdiction over certain claims.

c. This Court has yet to address head on the discord prevailing among the circuits on the issue. In *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), the Court considered whether the futility of a remand to a state court lacking jurisdiction should be the basis for dismissal. But the Court did not resolve the issue because it declined to find that remand would be futile in the particular circumstances of that case. 500 U.S. at 89 ("Similar uncertainties in the case before us preclude a finding that a remand would be futile."); *see also* 16 MOORE'S FEDERAL PRACTICE § 107.41[1][e][iii][E] (3d ed. 2006) (discussing the circuit split and stating that *International Primate* "discussed the futility doctrine but do[es] not reject it"). The circuits embracing a

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2000); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442 (4th Cir. 1996). In the decision below, the court of appeals limited its earlier decisions to their facts. App. 30a-32a.

futility exception to 28 U.S.C. § 1447(c), however, rely on dicta in *International Primate* for support.

The cacophony is deep-seated. At long last, the Court should revisit the derivative-jurisdiction doctrine. That jurisprudential consideration is especially important where, as here, the doctrine requires a district court to dismiss rather than remand federal questions whose resolution is constitutionally and statutorily reserved within the federal domain. By doing so, this Court would resolve the question left open in *International Primate*. In particular, this highly sensitive case could well serve as the vehicle for confirming that the derivative-jurisdiction doctrine retains its vitality where both the state and federal courts lack jurisdiction over a removed action.

4. The need for the Court to resolve this discord is heightened by the differential treatment the courts have given to cases removed under 28 U.S.C. § 1441 and those removed under Section 1442. That difference in treatment affected the disposition of this case below. *See* App. 23a n.8.

Section 1442 permits removal of actions brought against the United States, federal officers, and federal contractors like Blackwater. *See Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) ("[T]his Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)."); *see also McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1195-1200 (M.D. Fla. 2006); *Fisher v. Halliburton*, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006); *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2583438, at *1 (S.D. Tex. Sept. 7, 2006); *Smith v. Halliburton*, No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 30, 2006). Because Section 1441(f) applies only to "cases removed *under this section*," 28 U.S.C. § 1441(f)

(emphasis added), courts have held that it does not apply to removals under Section 1442 and that the derivative-jurisdiction doctrine continues to apply to such removals. *See Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir. 1998) ("It is clear that a federal court's jurisdiction upon removal under 28 U.S.C. § 1442(a)(1) is derivative of the state court jurisdiction, and where the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though in a like suit originally brought in federal court, the court would have had jurisdiction."); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) ("[B]ecause this case was removed from state court pursuant to § 1442, our jurisdiction is derivative of the state court's jurisdiction."); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 315 (7th Cir. 1994) ("When a case is removed from a state court pursuant to 28 U.S.C. § 1442, the district court's basis for jurisdiction is only derivative of that of the state court."). Thus, upon concluding that the state tribunal lacked subject-matter jurisdiction in a Section 1442 removal, the trial court should dismiss (rather than remand) when the state court has no jurisdiction. *See, e.g.*, *Cromer*, 159 F.3d at 879, 883; *In re Elko County*, 109 F.3d at 555.

This is precisely the opposite of what the Third, Fourth, Sixth, Seventh, and Eleventh Circuits have held is proper with respect to Section 1441 removals. As discussed, these courts have construed 28 U.S.C. § 1447(c) as mandating remand, rather than dismissal, where a case is removed from state court pursuant to Section 1441 and the state court lacked subject-matter jurisdiction. This should not be. There is no principled justification for the difference in treatment between Section 1441 and Section 1442 removals.

Section 1441(f) cannot provide that justification. Section 1441(f) does not, on its face, carve out an exception to Section 1447(c). To the contrary, that provision merely confirms that district courts have jurisdiction to hear a case

that has been removed from a state court lacking jurisdiction. Section 1441(f) is silent on whether district courts should dismiss, rather than remand, such a case where the federal court *also* lacks jurisdiction. Nothing in the statutory language of Sections 1441 or 1442, or in any decision of this Court, supports this differential treatment as a matter of federal practice.[4]

The instant case illustrates why there is utterly no basis for drawing such an ephemeral distinction. Although it is a federal contractor, Blackwater cited only Section 1441 in its removal notice; it did not cite Section 1442. App. 23a n.8. But this is neither here nor there. There is no doubt whatsoever that removal would have been proper under Section 1442. *See McMahon*, 410 F. Supp. 2d at 1195-1200. But even assuming *arguendo* that Section 1442 did not apply, *merely by citing it*, Blackwater would have ensured that, under the derivative-jurisdiction doctrine, either the district court would have dismissed the case or its failure to do so would have been reviewable under *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)[5]

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[4] Indeed, the different treatment of the derivative-jurisdiction doctrine under Section 1441 and Section 1442 results in contradictory requirements if a case is removed under both Section 1441 and Section 1442, and the district court finds that both it and the state court lack jurisdiction. The district court may have a duty to remand such a case on the grounds that there is no futility exception under Section 1447(c), yet have a duty to dismiss on the grounds that the derivative-jurisdiction doctrine applies with full force to Section 1442 removals.

[5] In *Thermtron*, this Court recognized an exception from the bar on appellate review in 28 U.S.C. § 1447(d) in cases where the district court "exceeded [its] statutorily defined power." 423 U.S. at 351; *see also Borneman*, 213 F.3d at 826 ("Accordingly, as *Thermtron* instructs, § 1447(d) prohibits review of district courts' determinations of whether jurisdictional statutes have been

Because Blackwater cited only Section 1441, the court of appeals did not consider whether remand was appropriate under Section 1442 jurisprudence. App. 23a n.8.

5. Absent this Court's review, the result of the Fourth Circuit's decision is that a state court in Wake County, North Carolina will decide whether respondents' claims fall within the scope of the DBA's coverage. As the Fourth Circuit previously has held, this issue is "exclusively a federal question which Congress never intended for state courts to resolve." *Shives*, 151 F.3d at 167 (citing 33 U.S.C. § 921 which the DBA extends overseas through 42 U.S.C. § 1651(a)). So too, the Fourth Circuit's decision will allow a state court to decide whether Blackwater's actions when accompanying U.S. armed forces during military operations, *see* 10 U.S.C. § 802, are exclusively under the command and control of the United States or are subject to the conflicting tort laws of fifty States. Moreover, in light of Congress' recent amendment to the UCMJ, 120 Stat. 2083 (amending 10 U.S.C. § 802(a)(10)), the decision below places before a state court the decision whether to exercise jurisdiction to impose tort liability for court-martial offenses in the field.

This is so, because even though the district court recognized that state courts lack jurisdiction over issues of DBA coverage, App. 47a, the trial court declared itself powerless to uphold the DBA; the court of appeals then deemed that conclusion erroneous but unreviewable. This profoundly destabilizing result should not be allowed to stand. Indeed, the state court lacked subject-matter jurisdiction not only based on Congress's clearly expressed intent in the DBA, which directs the U.S. Department of Labor to resolve questions of DBA coverage during military

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satisfied, not review of determinations where district courts exceed their jurisdictional authority.").

operations (followed by federal-court review), but also based on the political-question doctrine and principles of federalism: "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (emphasis added); *see Tarble's Case*, 80 U.S. 397, 408 (1872) (holding that a state court lacks jurisdiction because U.S. military forces operate "without question from any State authority").

This Court should resolve the split in the circuits over the applicability of the derivative-jurisdiction doctrine and whether it continues to mandate dismissal of a case removed under Section 1441 where both the federal and state court lack jurisdiction. This case presents a particularly compelling vehicle for doing so. It involves the constitutional exclusivity of federal command and control over the field of foreign military operations, as well as the statutory exclusivity of federal liability for contractor war casualties sustained in foreign theaters of battle.

II. The Court Of Appeals Has Jurisdiction To Review A Remand Order Notwithstanding 28 U.S.C. § 1447(d) When The Remand Order Would Circumvent Federal Statutory And Federal Constitutional Designs To Preclude State Court Jurisdiction.

1. This petition presents a question similar to one pending before this Court in *Osborn v. Haley*, No. 05-593. There, the Court directed the parties to brief the following question: "Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d)." *Osborn v. Haley*, 126 S. Ct. 2017 (2006). A question presented in *Osborn* is whether an exception exists to § 1447(d)'s bar on appellate review for cases arising

under the Westfall Act. That statute creates an exclusive federal remedy against the United States and, correspondingly, authorizes removal of cases in which the Attorney General certifies that the employee is acting within the scope of his employment. 28 U.S.C. § 2679.[6] A similar question is presented by the decision below: whether an exception exists to § 1447(d)'s bar on appellate review for cases raising claims within the exclusive province of the federal government. The Fourth's Circuit decision ignores the DBA's "Liability as exclusive" provision (42 U.S.C. § 1651(c)), and it allows respondents to proceed under state-tort law against American military contractors, despite Blackwater's claim that such an action unconstitutionally intrudes on the exclusive authority of the federal government to conduct military operations abroad.

2. Nothing in the text or legislative history of Section 1447(d) suggests that Congress intended to preclude appellate review of a remand order that relegates to a state court the resolution of respondents' constitutionally-suspect tort claims. To the contrary, Congress expressed a clear intent in the DBA that such tort lawsuits not be justiciable in a state court; rather, the "liability of a[] ... contractor ... under this chapter shall be exclusive and ***in place of all other liability*** of such ... contractor ... to his employees. 42

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[6] In *Osborn*, the district court remanded a state tort claim brought against an employee of an organization that contracted with the United States Forest Service. *See Osborn v. Haley*, 422 F.3d 359, 361 (6th Cir. 2005). The Attorney General had certified that the employee was acting within the scope of his employment, and thus argued that the state tort action should be deemed an action brought against the United States. The district court, however, rejected the Attorney General's certification and granted plaintiff's motion to remand for lack of jurisdiction. *Id.* The Sixth Circuit reversed both the certification ruling and the remand order, holding that the Westfall Act foreclosed remand. *Id.* at 364.

U.S.C. § 1651(c) (emphasis added). Section 1447(d) should not be construed in derogation of Congress' mandate, which displaces state-court jurisdiction over cases such as respondents' and thus ensures that state courts do not adjudicate the constitutional questions, including questions of federalism and separation of powers, that are raised by such lawsuits brought in contravention of the DBA.

The DBA is Congress' response to the question of tort liability arising from dangerous deployments by contractors in support of U.S. military operations (and other federal activities) outside the United States. Congress has legislated a solution consisting of extending the Longshore and Harbor Workers' Compensation Act ("LHWCA") overseas, but has foreclosed an election of remedies available under the LHWCA. The LHWCA is an exclusive remedy but for the concurrent availability of state workers compensation benefits. The LHWCA's exclusivity provision "shall apply" under the DBA, *see* 42 U.S.C. § 1651(a), except that the DBA also bars the LHWCA's alternative state workers compensation remedy. 42 U.S.C. § 1651(c) (DBA benefits shall be exclusive of any other liability "under the workmen's compensation law of any State"). Thus, Congress gives effect to the constitutional commitment of foreign affairs and war powers to the United States by expressly providing in the DBA that the States' concurrent remedy under the LHWCA stops at the water's edge.

The DBA is therefore a very specific statutory expression of Congress' intent to exclude the states from any interference in the relationship between contractors and persons working for them to advance federal interests overseas. *See* House Report 1070, p. 4, 7 (1941); Senate Rep. No. 92-1175, p. 4 (1972). And that statutory intent is immeasurably fortified by the fact that it rests on the constitutional allocation of foreign affairs and war powers to the United States.

3. This Court should grant certiorari and reverse because the Fourth Circuit's refusal to recognize an exception to Section 1447(d) deepens a circuit split on whether a statutory bar to appellate review should be construed to preclude a federal court of appeals from reviewing a constitutional question, such as the political question and separation of powers arguments raised by Blackwater below as requiring dismissal rather than remand of respondents' state tort lawsuit.

a. Nothing in the text or legislative history of Section 1447(d) suggests that Congress intended to preclude appellate review of remand orders that would foreclose federal review of constitutional questions. *Cf. Johnson v. Robison*, 415 U.S. 361, 365-68 (1974) ("[C]ontention that [38 U.S.C.] § 211(a) ['which prohibits judicial review of decisions of the Veterans' Administrator'] bars federal courts from deciding constitutionality of veterans' benefits legislation ... would, of course, raise serious questions concerning the constitutionality of § 211(a), and in such case 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided.' Plainly, no explicit provision of § 211(a) bars judicial consideration of appellee's constitutional claims .... Nor does the legislative history ... demonstrate a congressional intention to bar judicial review even of constitutional questions." (footnote and internal citation omitted)).

This lack of any specific congressional intent to preclude appellate review of constitutional questions should trigger the "cardinal principle"-based rule of construction set forth in *Johnson v. Robison* and followed as a rule by eight other courts of appeals, particularly where Congress has legislated that an employer's liability under the DBA "shall be

exclusive and in place of all other liability," 42 U.S.C. § 1651(c).[7]

b. The Fourth Circuit's refusal to recognize a constitutional-questions exception to Section 1447(d) thus creates a conflict with the decisions of eight other courts of appeals. The Ninth Circuit is the only other court of appeals in accord with the Fourth Circuit in "declin[ing] to graft a new exception [for constitutional questions] onto the already significantly burdened text of §1447(d)." App. 27a; *see also Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) ("The government argues that *Calcano-Martinez v. INS*, 533 U.S. 348 [] (2001), and *Webster v. Doe*, 486 U.S. 592, 603 [] (1988), give us license to resolve ['constitutional claims']. However, we have already held that an appellate court does not have jurisdiction to consider even substantial constitutional claims regarding removal orders covered by INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).") (citing three prior Ninth Circuit opinions).

Eight other circuits have held that a statutory bar to review does not preclude a federal court from addressing a constitutional claim, absent a clear statement of Congressional intent. Those circuits have followed this Court's admonition in *Johnson v. Robison*, *supra*, that any construction of a statutory bar to judicial review that would preclude review of "constitutional questions" would "raise serious questions concerning the constitutionality of [the statutory bar itself]," 415 U.S. at 366. *See Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989) ("In general, constitutional claims are judicially reviewable unless

[7] Indeed, as a matter of federalism, *see Tarble's Case*, 80 U.S. at 408, and as a matter of the political-question doctrine, *see Gilligan*, 413 U.S. at 10, the district court's remand order raises significant constitutional questions because it imposes on U.S. military contractors a risk of exposure to a patchwork quilt of state tort regulation that impedes foreign deployment of the contractor component of the "Total Force."

Congress clearly expresses its intent to preclude review."); *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 59 (D.C. Cir. 2001) ("When the Constitution is invoked, a claim of preclusion faces an especially high hurdle."); *Paluca v. Sec'y of Labor*, 813 F.2d 524, 526 (1st Cir. 1987); *S. Windsor Convalescent Home v. Mathews*, 541 F.2d 910, 914 (2d Cir. 1976) ("[T]he effect of precluding federal jurisdiction over constitutional questions ... would be at odds with the well established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by 'clear and convincing evidence.'"); *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir. 1993) (recognizing the "jurisprudential concerns associated with the inability to review a constitutional decision"); *Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 945 n.9 (5th Cir. 1999) ("'serious constitutional questions' ... would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *Chelsea Cmty. Hosp. v. Mich. Blue Cross Ass'n*, 630 F.2d 1131, 1135 (6th Cir. 1980) ("[I]t is a 'cardinal principle' that we should seek statutory constructions which avoid constitutional doubts, *Johnson v. Robison* ...."); *Czerkies v. Dep't of Labor*, 73 F.3d 1435, 1442-43 (7th Cir. 1996) (en banc) (Based on the "presumption against denying all judicial remedies for violations of the Constitution ... the district court had jurisdiction to consider ... constitutional claim [not] barred by 5 U.S.C. § 8128(b)."); *Nyeholt v. Secretary of Veterans Affairs*, 298 F.3d 1350, 1353-54 (Fed. Cir. 2002) (citing *Johnson*).

c. Any of the eight circuits that have spoken on the issue would have recognized that Blackwater's constitutional claims deserved careful appellate review, notwithstanding Section 1447(d). *Cf. Thermtron Prods.*, 423 U.S. at 351 ("Because the District Judge remanded a properly removed

case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)."). The district court's remand order delegates to a state court the duty to determine nonjusticiable political questions that are within the exclusive province of the federal government; it thus allows a state tort lawsuit to proceed in violation of the fundamental constitutional delegation of foreign affairs and war powers to the political branches of the federal government. This cannot be — a state court simply cannot regulate the order of battle. The Fourth Circuit nonetheless refused to review the remand order. App. 26a. But nothing in Section 1447(d) purports to strip appellate courts of jurisdiction to review orders that remand cases raising significant constitutional questions; there is certainly no clear statement of Congressional intent to do so. To the contrary, just as in *Osborn*, Congress has made clear its intent that state courts have no role to play in adjudicating claims that arise in the context of military action, including those of respondents.

4. Whether the Fourth Circuit properly declined to review the district court's remand order is of particular importance now, when respondents and others supporting the United States Government's efforts overseas are depending upon the "Liability as exclusive" provision of the DBA and at a time when the nation is at war. *See Tarble's Case*, 80 U.S. at 408; *see also Gilligan*, 413 U.S. at 10 ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."). In the past five months, five tort lawsuits against battlefield contractors have been dismissed as nonjusticiable by federal district courts based on the political-question doctrine. *See, e.g., Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 639-

45 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d. 1277, 1279-82 (M.D. Ga. 2006); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685, at *1-2 (S.D. Tex. Oct. 11, 2006); *Woodson v. Halliburton Corp.*, No. H-06-2107, 2006 U.S. Dist. LEXIS 70311, at *1-2 (S.D. Tex. Sept. 28, 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at *2–7 (S.D. Tex. Aug. 30, 2006).

In view of the manifest national importance of the constitutional issues at stake, this Court should grant certiorari to resolve the split in the circuits over whether there is a constitutional-questions exception to a statutory bar to judicial review, absent a clear statement of Congressional intent to preclude such review.

CONCLUSION

For the foregoing reasons, the petition should be granted. In the alternative, this Court should invite the views of the Solicitor General.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

In Re: BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation,

Petitioners.

IN RE: JUSTIN L. MCQUOWN,
Petitioner.

RICHARD P. NORDAN, as Ancillary Administrator for the separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona,

Plaintiff-Appellee,

and

ESTATE OF STEPHEN S. HELVENSTON;
ESTATE OF MIKE R. TEAGUE;
ESTATE OF JERKO GERALD ZOVKO;
ESTATE OF WESLEY J.K. BATALONA,

Plaintiffs,

v.

BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation,

Defendants-Appellants,

and

JUSTIN L. MCQUOWN, an individual; THOMAS POWELL,

Defendants.

RICHARD P. NORDAN, as Ancillary Administrator for the separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona,

Plaintiff-Appellee,

and

ESTATE OF STEPHEN S. HELVENSTON; ESTATE OF MIKE R. TEAGUE; ESTATE OF JERKO GERALD ZOVKO; ESTATE OF WESLEY J.K. BATALONA,

Plaintiffs,

v.

JUSTIN L. MCQUOWN, an individual, Defendant-Appellant, and BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation; THOMAS POWELL,

Defendants.

No. 05-1949

460 F.3d 576

Decided August 24, 2006

Before SHEDD and DUNCAN, Circuit Judges, and JONES, District Judge.

DUNCAN, Circuit Judge:

This appeal and petition for writ of mandamus require us to consider the extent to which we can review a district court order remanding a case to state court for lack of subject matter jurisdiction. Concluding that the limited exceptions to the congressional proscription of our ability to review such orders are not applicable here, we dismiss the appeal for lack of jurisdiction and decline to issue a writ of mandamus.

I.

Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona (collectively, "decedents") entered into independent contractor service agreements with Blackwater Security Consulting, L.L.C., and Blackwater Lodge and Training Center, Inc., (collectively, "Blackwater") to provide services in support of Blackwater's contracts with third parties in need of security or logistical support. Blackwater assigned the decedents to support its venture with Regency Hotel and Hospital Company ("Regency") to provide security to ESS Support Services Worldwide, Eurest Support Services (Cyprus) International, Ltd. ("ESS"). ESS had an agreement to provide catering, build, and design support to the defense contractor firm Kellogg, Brown & Root, which, in turn, had arranged with the United States Armed Forces to provide services in support of its operations in Iraq.

According to the complaint, at the time the decedents entered into the independent contractor service agreements on or about March 25, 2004, Blackwater represented that certain precautionary measures would be taken with respect to the performance of their security functions in Iraq. For example, they were told that each mission would be handled by a team of no fewer than six members, including a driver, navigator, and rear gunner, and would be performed in armored vehicles; they would have at least twenty-one days

prior to the start of a mission to become familiar with the area and routes to be traveled; and they would have an opportunity to do a pre-trip inspection of their anticipated route.

Instead, the complaint alleges, Blackwater failed to provide the decedents with the armored vehicles, equipment, personnel, weapons, maps, and other information that it had promised, or with the necessary lead time in which to familiarize themselves with the area. On March 30, 2004, the decedents' supervisor, Justin McQuown, directed them to escort three ESS flatbed trucks carrying food supplies to a United States Army base known as Camp Ridgeway. Lacking the necessary personnel and logistical support, the decedents ultimately became lost in the city of Fallujah. Armed insurgents ambushed the convoy; murdered the decedents; and beat, burned, and dismembered their remains. Two of the mutilated bodies were hung from a bridge.

Richard Nordan, in his capacity as administrator for the decedents' estates, sued Blackwater and McQuown (hereinafter referred to collectively as "Blackwater") in the Superior Court of Wake County, North Carolina, alleging causes of action for wrongful death and fraud under North Carolina tort law. Blackwater removed Nordan's action to federal district court. It asserted that 28 U.S.C. § 1441(a) (2000) permitted removal both because the Defense Base Act ("DBA"), 42 U.S.C. §§ 1651-1654 (2000), completely preempted Nordan's state-law claims, and because the issues in the case presented unique federal interests sufficient to create a federal question. Once in federal court, Blackwater moved to dismiss the case, arguing that the district court lacked subject matter jurisdiction because the DBA covered Nordan's claims and, therefore, that Nordan could litigate his claims only before the Department of Labor, which decides DBA claims in the first instance.

The district court first considered whether Blackwater had met its burden of establishing federal removal jurisdiction. *Nordan v. Blackwater Sec. Consulting*, 382 F. Supp. 2d 801, 806 (E.D.N.C. 2005). In concluding that Blackwater had not met this burden, the district court rejected both of Blackwater's asserted bases for removal jurisdiction. The court reasoned that, because the DBA grants the Secretary of Labor exclusive original jurisdiction over DBA claims, the statute does not completely preempt state-law claims; the hallmark of complete preemption, the district court concluded, is the presence of original jurisdiction over the matter in federal district court. *Id.* at 807-10 (citing *Lontz v. Tharp*, 413 F.3d 435, 442-43 (4th Cir. 2005)). Further, the court determined that Blackwater's assertion of removal jurisdiction by way of a unique federal interest in the adjudication of Nordan's claims "assume[d] the very conclusion which [the] court lack[ed] jurisdiction to reach, namely that the decedents in this case are covered as employees under the DBA." *Id.* at 813.

Finding no basis for removal, the district court concluded that it lacked subject matter jurisdiction and, citing 28 U.S.C. § 1447(c) (2000),[1] determined that it must remand the case. *Nordan*, 382 F. Supp. 2d at 813-14. Although Blackwater encouraged the district court to remedy its lack of jurisdiction by dismissing the case rather than remanding it, the district court further concluded that it lacked the authority to dismiss. The court reasoned that federal district courts play no role in the adjudication or review of DBA

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[1] Section 1447(c) provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . The State court may thereupon proceed with such case."

claims[2] and, therefore, that it had no jurisdiction to decide whether the DBA applied to Nordan's claims. *Id.* at 814. The district court thus remanded the case to state court without reaching the merits of Blackwater's motion to dismiss.

Blackwater now seeks review, via both an ordinary appeal and a petition for a writ of mandamus. For the reasons that follow, we hold that we lack jurisdiction to hear the appeal and decline to issue a writ of mandamus.[3]

II.

We first address the issue of our authority to review this case by appeal. Blackwater faces a formidable hurdle in this regard because Congress has severely circumscribed federal appellate review of certain orders remanding a case to the state court from which it was removed. We begin our analysis with a review of the body of law related to and developed from that jurisdictional circumscription. We then address whether the principles inherent in that body of law allow us to exercise appellate jurisdiction in this case.

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[2] The district court incorrectly concluded that the federal district courts play no role in the adjudication of DBA claims. The federal district courts, followed by the federal courts of appeals and the United States Supreme Court, review DBA claims after they have been initially adjudicated in the Department of Labor. See 42 U.S.C. § 1653(b) (2000); *see also Lee v. Boeing Co., Inc.*, 123 F.3d 801, 803-05 (4th Cir. 1997) (describing agency and judicial review of DBA claims).

[3] Nordan moved to strike a portion of the record that Blackwater submitted on appeal. Because we dismiss the appeal and the petition for lack of jurisdiction, we deny this motion as moot.

A.

1.

The legal principles that govern appellate jurisdiction in this case derive from Congress's limitation on our authority to review remand orders. A district court order "remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[4] 28 U.S.C. § 1447(d) (2000). This limitation on review applies even if the remand order is "manifestly, inarguably erroneous." *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (Phillips, J., specially concurring and delivering the opinion of the court on the issue of subject matter jurisdiction) (citing *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam)). If the plain language of the statute were all that we had to consult, we might not tarry long with the notion that we could entertain a review of the merits of this case. Several cases, however, provide for limited exceptions to the reach of § 1447(d).[5]

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[4] The full text of § 1447(d) is as follows:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

[5] In addition to the judicially developed exceptions upon which we focus today, § 1447(d) itself permits review of a remand order in a case removed to federal court pursuant to 28 U.S.C. § 1443 (2000), which concerns removal of state civil and criminal actions involving civil rights claims. In addition, a separate statute allows review of remand orders in cases concerning certain land restrictions applicable to the Five Civilized Tribes of Oklahoma. *See* Act of Aug. 4, 1947, ch. 458, sec. 3(c), 61 Stat. 731, 732, 25 U.S.C. § 355 note (2000); see also 28 U.S.C. § 1447 note (2000)

First, the Supreme Court has interpreted § 1447(d) to prohibit review only when the order of remand was based upon § 1447(c), which requires remand when the district court determines that it lacks subject matter jurisdiction. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) ("[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)."), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

Second, § 1447(d) does not prohibit review of a collateral decision that is severable from the remand order. *See City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140, 143, 55 S. Ct. 6, 79 L. Ed. 244 (1934) (holding § 1447(d) inapplicable to the portion of a remand order that dismissed a cross-claim because the dismissal "in logic and in fact . . . preceded [the order] of remand and was made by the District Court while it had control of the cause . . . . [A]nd, if not reversed or set aside, [the dismissal] is conclusive upon the petitioner"); *see also Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) ("[W]here portions of a remand order are 'in logic and in fact' severable from the court's determinations regarding remand, we may review the severable portions of the order on appeal.") (citing *Waco*, 293 U.S. at 143).

Finally, § 1447(d) does not prohibit review of a remand order if that order exceeds the scope of the district court's authority. *See Thermtron*, 423 U.S. at 351 (holding that § 1447(d) does not bar review of a remand order based on

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(Exception to Subsection (d)). Neither statutory provision is at issue in this case.

"grounds that [the district court] had no authority to consider" because such action "exceed[s] [the court's] statutorily defined power"); *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000) (" § 1447(d) prohibits review of district courts' determinations of whether jurisdictional statutes have been satisfied, not review of determinations where district courts exceed their jurisdictional authority") (citing *Thermtron*, 423 U.S. at 351). The issue before us is whether one of these limited exceptions to the broad jurisdictional proscription of § 1447(d) applies to the district court's actions in this case.

2.

In order to determine whether an exception to § 1447(d) allows us to exercise appellate jurisdiction in this case, we draw from a related body of statutory text and jurisprudence governing removal of cases from state court to federal district court. Except as federal law may otherwise provide, when a defendant removes a state civil action to federal district court, federal removal jurisdiction exists if the action is one "of which the district courts of the United States have original jurisdiction." § 1441(a). Among other categories of cases, the federal district courts possess original jurisdiction over civil cases raising federal questions, which are "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). Removal jurisdiction is not a favored construction; we construe it strictly in light of the federalism concerns inherent in that form of federal jurisdiction. *See Lontz*, 413 F.3d at 440. The party seeking removal bears the burden of demonstrating that removal jurisdiction is proper. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994).

Under what has become known as the well-pleaded complaint rule, § 1331 federal question jurisdiction is limited

to actions in which the plaintiff's well-pleaded complaint raises an issue of federal law; actions in which defendants merely claim a substantive federal defense to a state-law claim do not raise a federal question. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126 (1908). In other words, a defendant may not defend his way into federal court because a federal defense does not create a federal question under § 1331.

The doctrine of complete preemption provides a corollary to the well-pleaded complaint rule. This doctrine recognizes that some federal laws evince such a strong federal interest that, when they apply to the facts underpinning the plaintiff's state-law claim, they convert that claim into one arising under federal law. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Because complete preemption transforms a state-law claim into one arising under federal law, "the well pleaded complaint rule is satisfied" even though the complainant never intended to raise an issue of federal law. *Lontz*, 413 F.3d at 441. However, "the *sine qua non* of complete preemption is a preexisting federal cause of action that can be brought in the district courts. . . . Congress's allocation of authority to an agency and away from district courts defeats a complete preemption claim . . . ." *Id.* at 442-43. The doctrine of complete preemption, therefore, concerns itself with the uniquely jurisdictional inquiry into whether a purportedly state-law claim actually arises under federal law so as to create federal jurisdiction over that claim.

By contrast, under the principles of "ordinary" preemption, some federal laws may simply provide either a substantive defense to a plaintiff's state-law claims or a right to adjudication of those claims in a federal administrative forum or according to a federal scheme. *See generally id.* at

440. "Complete preemption is a jurisdictional doctrine, while ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim." *Id.* (internal quotation marks and citation omitted). The presence of ordinary federal preemption thus does not provide a basis for federal question jurisdiction, and, in a case removed from state court on the basis of federal question jurisdiction, is relevant only after the district court has determined that removal was proper and that it has subject matter jurisdiction over the case.

B.

We now turn our attention to the district court's actions in this case to determine whether § 1447(d) removes our ability to hear it.

1.

As we have explained, § 1447(d) bars appellate review of a remand order only if that order was issued pursuant to § 1447(c)'s instruction to remand removed cases over which the district court possesses no subject matter jurisdiction. *See Thermtron*, 423 U.S. at 346. However, a district court's mere citation to § 1447(c) is insufficient to bring a remand order within the purview of that provision. We must instead look to the substantive reasoning behind the order to determine whether it was issued based upon the district court's perception that it lacked subject matter jurisdiction. *See, e.g.*, *Borneman*, 213 F.3d at 824-25 ("Whether a district court's remand order is reviewable under § 1447(d) is not determined by whether the order explicitly cites § 1447(c) or not. The bar of § 1447(d) applies to any order invoking substantively one of the grounds specified in § 1447(c).") (internal citation omitted).

The district court's remand order in this case clearly falls within the ambit of § 1447(c)'s requirement of remand in the absence of subject matter jurisdiction. The court first concluded that the DBA did not completely preempt overlapping state law and thus did not create a federal question. *Nordan*, 382 F. Supp. 2d at 807-11. It then reasoned that Blackwater's assertion of a unique federal interest in the adjudication of Nordan's claims likewise did not confer federal removal jurisdiction. *Id.* at 811-13. The district court cited the untenability of these two suggested jurisdictional bases as the source of its decision to remand the case. "[T]his court lacks subject matter jurisdiction over this cause of action . . . . [W]here the court finds no basis for subject matter jurisdiction, § 1447(c) compels the court to remand this action to state court. . . . Accordingly . . . remand, rather than dismissal for lack of subject matter jurisdiction, is proper." *Id.* at 813-14.

To conclude that the remand order was issued pursuant to § 1447(c), we need not delve into whether the district court was correct to hold that it lacked subject matter jurisdiction over the removed action. Rather, an order is issued pursuant to section § 1447(c) if the district court perceived that it was without jurisdiction over the cause. *See, e.g.*, *Mangold*, 77 F.3d at 1450 (holding that courts must "look past contextually ambiguous allusions and even specific citations to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand"). Furthermore, as we have noted, § 1447(d)'s jurisdictional bar applies with equal force to unassailably correct and "manifestly, inarguably erroneous" orders of remand. *Id.* Because the reasoning behind the district court's remand order in this case indicates the court's belief that it lacked subject matter jurisdiction upon removal, we conclude that the remand order was issued pursuant to § 1447(c) and,

consequently, that § 1447(d) prohibits our review of that order.

2.

Having determined that the order before us was, indeed, predicated upon § 1447(c), and therefore within the purview of § 1447(d), we turn now to a consideration of whether one of the other judicially created exceptions to § 1447(d) applies. The severable order exception to § 1447(d) set forth in *Waco* allows appellate review of certain distinct component decisions that may be issued as part of a remand order. We first discuss the contours of the *Waco* severable order exception and then consider whether *Waco* permits review of two constituent aspects of the district court's remand order.

a.

The Supreme Court in *Waco* construed § 1447(d) not to prohibit categorically appeals of certain orders in cases that had been remanded to state court. In that case, the district court dismissed the claim upon which the court's removal jurisdiction had been based; it then remanded the case to the state court because, once the claim was no longer part of the case, no basis for federal jurisdiction existed. The Supreme Court held that § 1447(d)'s prohibition of appellate review did not apply to the order dismissing the claim, even though it clearly applied to the remand order itself. *Waco*, 293 U.S. at 143-44. The order dismissing the claim was appealable, the Court reasoned, because "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner." *Id.* at 143. The Court concluded that, though action on the order of dismissal

"cannot affect the order of remand . . . it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy . . . to the state court . . . ." *Id.* at 143-44.

This circuit has construed *Waco* to require, at a minimum, that the purportedly reviewable order have a conclusive effect upon the parties' substantive rights. *See Nutter,* 4 F.3d at 321. We have interpreted this conclusiveness requirement to mean that the challenged order must have a preclusive effect in subsequent proceedings. *See id.*

As the Supreme Court recently reiterated, *Waco* also requires that the reviewable decision be able to be "disaggregated" from the remand order itself because "the order of remand cannot be affected notwithstanding any reversal of a separate order." *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2156 n.13, 165 L. Ed. 2d 92 (2006) (internal quotation marks and citation omitted). Similarly, other circuits have had occasion to recognize as a key component of *Waco* the requirement that the reviewable decision be logically and factually precedent to the remand order. *See, e.g., Carlson v. Arrowhead Concrete Works*, Inc., 445 F.3d 1046, 1052 (8th Cir. 2006) (holding that *Waco* requires that the reviewed decision be both conclusive on the parties and logically and factually precedent to the remand order); *Hernandez v. Seminole County*, 334 F.3d 1233, 1241 (11th Cir. 2003) (construing *Waco* to require the challenged decision to be both conclusive on the parties and logically and factually precedent to the remand order); *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 99 (1st Cir. 2001) (holding *Waco* applicable to a decision that was not "inextricably intertwined with" or essential to the remand order); *Carr v. Am. Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994) (explaining that *Waco* requires the reviewed portion of

a remand order to be "both logically precedent to, and separable from, the remand decision" and measuring the severability of an issue by whether the district court reached it as part of an inquiry into the existence of subject matter jurisdiction); *see also Kimbro v. Velten*, 308 U.S. App. D.C. 134, 30 F.3d 1501, 1503 (D.C. Cir. 1994) (concluding that Waco applies to decisions that "logically precede[] the question of remand") (internal quotation marks and citation omitted). Our precedent also suggests that *Waco* applies to orders that are logically and factually "antecedent" to the order of remand. *See Borneman*, 213 F.3d at 825 (holding § 1447(d) inapplicable to two "antecedent components of the district court's remand order"). We therefore conclude that logical and factual severability, along with conclusiveness, are central requirements of Waco's exception to § 1447(d).

b.

i.

Blackwater argues that *Waco* permits appellate review of the district court's choice of remedy for its lack of removal jurisdiction. Specifically, the district court denied as moot Blackwater's motion to dismiss for lack of jurisdiction, choosing instead to cure its lack of removal jurisdiction by remanding Nordan's claims to state court. According to Blackwater, the district court's denial of its motion to dismiss is reviewable because it conclusively decided Blackwater's assertion that the DBA and the Constitution's foreign affairs and war powers clauses convey upon it an immunity from suit in either state or federal court. This position relies heavily on our decision in *Shives v. CSX Transp., Inc.* (*In re CSX Transp., Inc.*), 151 F.3d 164 (4th Cir. 1998). For the reasons that follow, its reliance is misplaced.

Shives concerned a railroad employee's action in state court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51-60 (West 1986 & Supp. 2006), against his employer for injuries that he had sustained while unloading a train at a marine terminal. The employer removed the case to federal court, claiming that the case raised a federal question. The employer then moved to dismiss the case, arguing that, because the employee had been injured while performing maritime work, he could receive compensation for that injury only by filing a claim with the United States Department of Labor under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C.A. §§ 901-950 (West 2001 & Supp. 2006). Because 28 U.S.C. § 1445(a) (2000) prohibited removal of FELA claims that had been initiated in state court, the district court first had to determine whether the FELA or the LHWCA covered the employee's claims. The district court concluded that the employee had not been engaged in maritime work and, therefore, that the LHWCA did not apply. Because the LHWCA did not apply, the court concluded, the claim had been properly filed under the FELA. The district court then remanded the case to state court because § 1445(a) prohibited removal of the case.

"[W]ith some delicacy," we exercised appellate jurisdiction of the employer's appeal of the remand order. *Shives*, 151 F.3d at 168. We first concluded that the remand was not based on the district court's perceived lack of subject matter jurisdiction and, therefore, that it had not been issued pursuant to § 1447(c). *Id.* at 167. The district court, we reasoned, had not perceived that it lacked subject matter jurisdiction over the employee's FELA claim because federal and state courts have concurrent original jurisdiction over such claims. *Id.* Instead, it had remanded the case because § 1445(a) prohibited removal in that instance. *Id.*

Alternatively, we concluded that the district court's decision concerning the LHWCA's applicability to the employee's claim was a "conceptual antecedent" to the order of remand. *Id.* We noted that letting the remand order stand would

> commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals.

Id.

The procedural posture of this case distinguishes it from *Shives* in two critical particulars. First, as already noted, in Shives we exercised appellate jurisdiction over an appeal of a remand order that we somewhat hesitantly construed to be predicated upon § 1445(a)'s prohibition against removal of state-filed FELA claims, not upon § 1447(c)'s mandate to remand in the absence of subject matter jurisdiction. *See id.* at 167-68. Because the Supreme Court has clarified that § 1447(d)'s restriction on review applies only to remand orders made pursuant to § 1447(c), *see Thermtron*, 423 U.S. at 346, we concluded that § 1447(d) did not prohibit appellate jurisdiction, *see Shives*, 151 F.3d at 167. In other words, appellate jurisdiction existed in *Shives* because the district court's order did not rest upon lack of subject matter jurisdiction, the ground set forth in § 1447(c).[6] By contrast,

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[6] We drew a similar conclusion in *Mangold*, 77 F.3d at 1452, a decision that Blackwater misguidedly cites to ameliorate its jurisdictional position in this case. In that case, we concluded that § 1447(d) did not prohibit appellate review of the district court's remand order because that order did not arise from the district

as we have explained, the district court remanded this case under § 1447(c) for lack of subject matter jurisdiction.

The second distinction that defeats Blackwater's reliance on *Shives* to support appellate jurisdiction in this case is the existence in *Shives* of a "conceptual antecedent" to the district court's remand order. As we have noted, a key component of Waco's collateral order exception is that the challenged order "in logic and in fact . . . preceded that of remand." *Waco*, 293 U.S. at 143. The district court in *Shives* faced, on the one hand, § 1445(a), which prohibited removal of state-filed FELA claims, and, on the other hand, a notice of removal claiming that the plaintiff's claim was not brought under the FELA but was instead preempted by the LHWCA. We concluded in *Shives* that the district court had remanded the case because § 1445(a) prohibited removal of FELA claims. *See* 151 F.3d at 167. In order to reach its conclusion that § 1445(a) prohibited removal, the district court in *Shives* had to determine whether the LHWCA applied to the employee's claim. If the LHWCA was applicable, it would erase § 1445(a)'s protection of state-filed FELA claims from removal. *Shives* thus presented the court of appeals with an LHWCA coverage decision by the district court, a distinct determination that was not entangled with the jurisdictional analysis supporting the remand order. *Shives* itself does not cite to *Waco* or explain how the LHWCA coverage decision at issue in that case satisfied Waco's severability standard. It is nevertheless clear that we took appellate jurisdiction in *Shives* because the district court made a decision that was a "conceptual antecedent" to the remand order. That conceptual antecedent took the form of the district court's substantive ruling that, because the plaintiff had not been engaged in maritime employment, the

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court's perception that it lacked subject matter jurisdiction, and thus was not issued pursuant to § 1447(c). *Id.*

application of the LHWCA had not been triggered in that case. *See id.*

No such conceptual antecedent exists here. The district court made no DBA coverage decision that might form the basis of our review. In *Shives*, the district court reached the issue of the LHWCA's application to the plaintiff's claim, but not because it needed help deciding how to remedy its lack of removal jurisdiction. Rather, a determination of LHWCA coverage in *Shives* was a necessary step in the district court's inquiry into the permissibility of removal. Here, the district court appropriately did not decide whether the DBA applied to Nordan's claims because such an inquiry was both unnecessary to its jurisdictional analysis and unreachable on the merits once the court had determined that removal jurisdiction was absent.[7]

The fact that the district court's order made no determination of DBA coverage has significance beyond serving to distinguish the facts before us from those in *Shives*. It also supports our conclusion that the denial of Blackwater's motion to dismiss was not conclusive upon its substantive rights. We note again the caution in *Nutter* that, for the purpose of determining whether an order meets the criteria of *Waco*, "[a]t a minimum, the challenged portion of the order must affect the parties' substantive rights" by having a preclusive effect in subsequent proceedings. *Nutter*, 4 F.3d at 321. Here, the district court made no determination with respect to whether the DBA covered

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[7] Another case upon which Blackwater significantly relies is also distinguishable on this basis. In *Jamison v. Wiley*, 14 F.3d 222, 233 (4th Cir. 1994), we concluded that *Waco*'s exception permitted review of the district court's refusal to substitute the United States as a defendant. We so concluded because the district court decided to deny substitution "before it decided to remand the case to state court, while it still had control of the case." *Id.*

Nordan's claims. One of the first principles of preclusion, however, is that the precluding order either actually determined the issue sought to be precluded (in the case of issue preclusion) or issued a final judgment on the merits (in the case of claim preclusion). *See, e.g.*, *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 650, 653 (4th Cir. 2005). Therefore, neither the district court's refusal to decide whether the DBA applies to Nordan's claims, nor its concurrent conclusion that it lacked jurisdiction to reach the merits of the case will have any preclusive effect on Blackwater's ability to assert in state court its arguments concerning ordinary federal preemption.

We further note that remanding despite a potential federal defense does not hamstring the litigation of that defense in state court. In *Lontz*, 413 F.3d 435, we decided a similar case in which the defendant had removed a state labor dispute to federal court, claiming federal question jurisdiction via complete preemption. The *Lontz* defendant had claimed complete preemption on the theory that Sections 7 and 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157-158 (2000), required resolution of certain labor disputes before the National Labor Relations Board ("NLRB") rather than in state or federal court. We concluded that the NLRA provisions do not completely preempt state law and that the district court consequently lacked federal question removal jurisdiction. *Lontz*, 413 F.3d at 442-43. We directed the district court to remand, rather than dismiss, claims that, if the NLRA applied to them, would not be justiciable in state court. *See id.* at 443-44. We recognized in Lontz that, to the extent that the NLRA applied to the plaintiff's claims, the statute entitled the defendant to adjudication of those claims solely before the NLRB. *See id.* Nevertheless, that possible entitlement did not transform a defense of ordinary federal preemption into a right to a federal forum in which to raise and litigate

that defense on the merits. Furthermore, "the futility of a remand to [state court] does not provide an exception to the plain meaning of § 1447(c)." *Roach v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996). We therefore see no reason why Blackwater's possible entitlement to adjudication before the Department of Labor should allow it to characterize the district court's denial of its motion to dismiss as a conclusive denial of a substantive right.

Finally, once a district court determines that it lacks subject matter jurisdiction over a removed case, § 1447(c) directs that the case "shall be remanded." This mandate is so clear that, once a district court has found that it lacks subject matter jurisdiction in a removed case, no other fact-finding, legal analysis, or exercise of judicial discretion is necessary in order to follow the congressional directive; the decision to remand a case to remedy a lack of subject matter jurisdiction is purely ministerial. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991) (noting that § 1447(c) grants "no discretion to dismiss rather than remand [a removed] action" in which subject matter jurisdiction is lacking (internal quotation marks and citation omitted)), superseded on other grounds by 28 U.S.C. § 1442(a)(1) (2000). We therefore conclude that the district court's "decision" to remand instead of dismiss is not only not conclusive, but also intimately enmeshed with and unseverable from the remand order.

ii.

We similarly do not have jurisdiction under *Waco*'s severable order exception to review the district court's conclusions that neither complete preemption nor a unique federal interest created a federal question for the purposes of

removal. Our decision in *Nutter*, 4 F.3d 319, forecloses the possibility.

The *Nutter* defendant had claimed that removal jurisdiction was proper because two federal statutes completely preempted the plaintiff's state-law claims and, therefore, presented federal questions. The district court rejected this complete preemption argument and remanded the case to state court for lack of removal jurisdiction. We concluded that this determination that the federal statutes did not completely preempt Nutter's state-law claims would have no preclusive effect in subsequent proceedings and thus that it was not a decision that was conclusive upon the parties. *Id.* at 321-22.

Similarly here, the district court's findings regarding complete preemption could foreclose state-court litigation of Blackwater's DBA and constitutional claims only if principles of preclusion prevented Blackwater from later raising a defense of ordinary federal preemption. Here, as we did in *Nutter*, we conclude that the district court's finding that complete preemption did not create federal removal jurisdiction will have no preclusive effect on a subsequent state-court defense of federal preemption. We conclude that *Nutter*'s reasoning applies with equal force to the district court's companion conclusion that Blackwater's asserted unique federal interest could not convey federal removal jurisdiction.

In addition, the district court's complete preemption and unique federal interest analysis cannot be disengaged from the remand order itself. In *Nutter*, we concluded that the district court's complete preemption conclusion was unseverable from its determination that it lacked removal jurisdiction: "the [district] court's findings regarding preemption and jurisdiction are indistinguishable. The

preemption findings were merely subsidiary legal steps on the way to its determination that the case was not properly removed." *Id.* at 321 (internal quotation marks and citation omitted). Indeed, the district court's conclusions here with respect to complete preemption and the presence of a unique federal interest cannot be severed from the remand order, as they are simply the necessary legal underpinning to the court's determination that the case was not properly removed.[8]

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[8] Blackwater additionally argues that it is the functional equivalent of a federal officer and that removal jurisdiction therefore existed in the district court under 28 U.S.C. § 1442(a) (2000). Blackwater failed to raise this issue before the district court. Citing 28 U.S.C. § 1653 (2000), Blackwater nevertheless invites us to deem its notice of removal to be amended to include § 1442(a) as an asserted basis for removal, to interpret the district court's failure to consider that basis as severable from its remand order under *Waco*, and thereby to create jurisdiction to review an issue that the district court never considered.

While "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," § 1653, Blackwater did not simply omit to cite to § 1442(a). Rather, it failed to argue before the district court that the provision supported removal. This court generally declines to consider issues raised for the first time on appeal absent a fundamental miscarriage of justice. *See, e.g.*, *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). Even if it were appropriate, at this point, to deem an action taken that Blackwater never sought to take, it would not cure Blackwater's waiver of the possible jurisdictional basis by failing to marshal arguments and evidence in support of it below. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421-22 (4th Cir. 2005) (holding that a miscarriage of justice had not occurred, so as to require appellate review, when the district court failed to consider a cause of action not presented to it). We therefore do not consider whether § 1447(d) bars our review of this newly raised issue.

3.

As we have explained, § 1447(d) also does not apply to remand orders based upon factors that the district court was not statutorily authorized to consider. *See Thermtron*, 423 U.S. at 351. A district court exceeds its statutory authority when it remands a case "on grounds that seem justifiable to [the court] but which are not recognized by the controlling statute." *Id.* For example, in *Thermtron* the Supreme Court held that § 1447(d) does not prohibit review of a remand order based on the district court's assessment that its docket was too crowded to hear the case. *Id.*

Blackwater argues that the court exceeded its authority by remanding the case instead of dismissing it. The district court declined to dismiss the case as an alternative to remand because it determined that it did not have the authority to decide whether the DBA applied to Nordan's claims. *Nordan*, 382 F. Supp. 2d at 814. It based this determination upon the erroneous belief that district courts play no role in the federal judicial review of DBA claims.[9] *Id.* Blackwater claims that this error concerning the pipeline of review of DBA claims demonstrates that the district court exceeded its authority by remanding and that the order is therefore not subject to § 1447(d)'s prohibition of review. It contends that the district court's remand order had nothing to do with its

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[9] As we have noted, the federal district courts, followed by the federal courts of appeals and the United States Supreme Court, review DBA claims after they have been initially adjudicated in the Department of Labor. *See* 42 U.S.C. § 1653(b) (2000); *see also Lee v. Boeing Co., Inc.*, 123 F.3d 801, 803-05 (4th Cir. 1997) (describing agency and judicial review of DBA claims).

stated lack of removal jurisdiction and was instead based on an erroneous interpretation of the DBA's judicial review provisions.

The district court did not remand on statutorily unauthorized grounds. Rather, as we have already explained, the remand order was based upon the district court's judgment that removal jurisdiction was not present. Of course, we need look no further than § 1447(c) to conclude that Congress has not only authorized remand under such a circumstance, but also emphatically required it. The district court's error concerning the mechanism of judicial review of DBA claims is a non sequitur to its determination that remand was necessary because it lacked subject matter jurisdiction to reach any issue other than the removability of the action.

The correctness of the district court's jurisdictional analysis is irrelevant under § 1447(d). *See Mangold*, 77 F.3d at 1450. If it were not, we could circumvent the statute simply by declaring the remand order to be wrong. Such an interpretation of § 1447(d) would eviscerate the congressional policy of limiting litigation over the procedural matters that give rise to remand orders. We also need not decide whether, possessing a proper understanding of the district court's role in the judicial review of DBA claims, the district court would have been correct to dismiss the case rather than remand it. For the purposes of § 1447(d), the only relevant aspect of the district court's decision not to dismiss the case is that it was grounded upon a perceived lack of subject matter jurisdiction to decide DBA claims. The presence of an error in that analysis does not change its jurisdictional character. *Thermtron*'s exception to § 1447(d) for *ultra vires* remands thus does not apply in this case.

4.

Finally, Blackwater argues that § 1447(d) does not prohibit appellate review in this case because the district court's decision to remand undermines the constitutional sequestration of foreign affairs and war powers within the political branches of the federal government, out of reach of both the federal and the state judiciaries. Specifically, it contends that:

> Even if the DBA is not applicable, the constitutional separation of powers would preclude judicial intrusion into the manner in which the contractor component of the American military deployment in Iraq is trained, armed, and deployed. Decedents were performing a classic military function -- providing an armed escort for a supply convoy under orders to reach an Army base -- with authorization from the Office of the Secretary of Defense that classified their missions as "official duties" in support of the Coalition Provisional Authority. Federal courts, and a fortiori state courts, may not impose liability for casualties sustained in the battlefield in the performance of these duties. A North Carolina trial court may not adjudicate national political questions that the Supreme Court has deemed non-justiciable by federal courts.

Br. of Appellant pp. 10-11.

Blackwater overstates both the extent of our decision today and the state of the record. What we have before us is a complaint alleging that the decedents were independent contractors working for a security company, a notice of removal, a motion to dismiss, and a remand order. Without intending to diminish the magnitude of the concerns that Blackwater articulates, we are unprepared to say at this

juncture that the Constitution overrides Congress's ability to prescribe the limits of federal appellate jurisdiction in matters such as these.

Blackwater's argument that neither federal nor state courts may decide decedents' claims also proves too much. Distilled to their essence, Blackwater's arguments appear to be that we must have jurisdiction because we have no jurisdiction and that our founding document simultaneously creates and prohibits jurisdiction in this case. Both constitutional interpretations are too extravagantly recursive for us to accept. It is, in fact, axiomatic under our federalist system of government that state courts have the authority to decide federal constitutional issues. Blackwater may assert in state court, subject to review by the United States Supreme Court, its defenses regarding the constitutional exclusivity of a federal administrative remedy. As we recently noted in *Lontz*, the ability of a state court "to determine its own jurisdiction is a serious obligation, and not something that federal courts may easily take for themselves." 413 F.3d at 442. For these reasons, we decline to graft a new exception onto the already significantly burdened text of § 1447(d).

III.

Blackwater alternatively claims that, even if § 1447(d) prohibits appellate jurisdiction, we should issue a writ of mandamus to the district court. We are unpersuaded.

We may issue a writ of mandamus if the petitioner has no other adequate means to obtain relief to which there is a "clear and indisputable" right. *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 433 (4th Cir 2005). "Mandamus is a drastic remedy to be invoked only in extraordinary situations." *United States v. Moussaoui*, 333 F.3d 509, 516

(4th Cir. 2003 (internal quotation marks and citation omitted). Before we may determine whether Blackwater has met these stringent requirements, however, we must first inquire whether we have the authority to issue the writ.

A.

Congress's restriction on review of remand orders applies to review "on appeal or otherwise." § 1447(d). The Supreme Court has interpreted this language to forbid the use of mandamus to circumvent the requirements of § 1447(d). *Thermtron*, 423 U.S. at 343. Given that § 1447(d) precludes our ability to review the district court's order by appeal, precedent dictates that it applies to preclude our review by mandamus as well.

Further, given the state of the record at this juncture, reflecting only cursory, untested factual allegations, mandamus would still be inappropriate under these circumstances. Mandamus is an extraordinary remedy whose issuance depends upon the discretion of the court considering the petition. *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 502, 511 (4th Cir. 1999) (citing Kerr v. U.S. Dist. Court for the N. Dist. of Cal., 426 U.S. 394, 40396 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)). As the Supreme Court has instructed, we refrain from issuing a writ of mandamus in all but the most extraordinary circumstances to avoid circumventing congressional judgments about the proper scope of appellate jurisdiction. *See Kerr*, 426 U.S. at 403 ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress.").

B.

Blackwater argues, however, that we may issue a writ of mandamus because this case presents a conflict between § 1447(d) and the DBA. We held in *Borneman* that § 1447(d) could not "be read categorically when other statutes in tension with it are considered." 213 F.3d at 825. Because we interpreted the statute creating that tension to prohibit absolutely the district court's remand of the case, we concluded that this tension alternatively permitted review via mandamus. *Id.* at 826. However, the statute "in tension" with § 1447(d) in *Borneman* declared that certain state-court actions brought against federal employees "shall be removed." 28 U.S.C. § 2679(d)(2) (2000).[10] That statute thus directly and specifically addressed the removability of the relevant class of claims and contained language that channeled the district court's authority to remand in such cases. This absence of discretion to remand created the tension of which we spoke in *Borneman*. 213 F.3d at 825. By contrast, Blackwater has not identified any portion of the DBA that similarly addresses either the removability to federal district court of state court actions purportedly

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[10] The tension-creating statute in Borneman was a portion of the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act"). Sections 5 and 6 of the Westfall Act, 28 U.S.C. § 2679(b), (d) (2000), give federal employees absolute immunity from liability in tort for actions within the scope of their employment and create a procedural mechanism by which this immunity is enforced. When a federal employee is sued for a tort committed within the scope of his or her employment, the Attorney General may issue a certification that the facts underlying the claim did in fact arise within the scope of the defendant's federal employment. § 2679(d)(1)-(2). If such a certification is issued in a case brought in state court, the case "shall be removed without bond . . . to the [appropriate federal] district court," where the court must substitute the United States as the sole defendant. § 2679(d)(2).

preempted by the DBA or the district court's peculiar lack of discretion with respect to remand of such cases.[11]

C.

Blackwater next argues that we may issue a writ of mandamus because the remand order risks unnecessary tension between state and federal judicial fora on an extraordinarily important question of federal law. Blackwater attempts to characterize our opinions in *Mangold*, *Jamison*, and *Shives* as authority for the proposition that a writ of mandamus may issue despite the applicability of § 1447(d) simply because the remand will have the practical effect of allowing a state court to decide a federal issue. Blackwater misapprehends the import of our jurisprudence in two fundamental respects.

First, Blackwater contorts the meaning of *Thermtron*, in which the Supreme Court held that federal appellate courts may review via mandamus remand orders that are not covered by § 1447(d). The *Thermtron* Court concluded that, even though § 1447(d) did not apply to the remand order at issue, the order was nevertheless unreviewable by appeal because it was not a final judgment. 423 U.S. at 352-53, overruled by *Quackenbush*, 517 U.S. at 714-15 (holding that remand orders are final for the purposes of appellate review). *Thermtron*, therefore, established mandamus as a means to circumvent not § 1447(d)'s proscription against review of certain remand orders, but the finality requirement of 28 U.S.C. § 1291 (2000). 423 U.S. at 352-53. Similarly, in *Mangold* and *Jamison*, we referred to the use of the writ of mandamus not as an end-run around § 1447(d) but as an

[11] Indeed, the statutory authority under which Blackwater sought removal in this case simply allows that state-court actions raising a federal question "may be removed" to federal district court. § 1441(a).

alternative to satisfaction of § 1291 or membership in the narrow class of collateral orders reviewable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). *See Mangold*, 77 F.3d at 1453; Jamison, 14 F.3d at 233-34. Because we conclude that Blackwater has not overcome the hurdle of § 1447(d), we have no occasion to consider whether the doctrine of finality has been satisfied in this case.

Second, *Blackwater* fails to acknowledge a key difference between the record before us today and the record before us in *Shives*. We expressed in *Shives* some doubt about our ability to exercise appellate jurisdiction, but concluded that we could, in the alternative, issue a writ of mandamus "[t]o avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues." 151 F.3d at 167. As we have explained, in *Shives*, the district court decided whether the employee's claim, which had been filed in state court under the FELA, was in fact covered by the LHWCA. If the FELA provided the employee with his cause of action, then removal was improper because § 1445(a) prohibits removal of state-filed FELA claims. However, if the LHWCA governed the claim instead, the employee could not proceed under the FELA and § 1445(a) would not apply. Determination of the applicability of the LHWCA to the employee's claims was, therefore, a critical step in the district court's inquiry into the propriety of removal in that case. Furthermore, the parties had stipulated to the facts relevant to the question of whether the LHWCA applied to the employee's claim. *Shives* thus presented the court of appeals with an order in which the district court actually decided, on an uncontested factual record and as part of its inquiry into the permissibility of removal, whether the LHWCA covered the plaintiff's claims.

Here, as we have explained, we have no coverage question to review -- and rightfully so, as the district court did not need to reach that issue as part of its removal jurisdiction analysis -- nor do we have a factual record in which the legally material facts are uncontested. Given the preliminary nature of the proceedings below and the resulting lack of adversarial development of the factual allegations in this case, as well as the absence of an independently reviewable order, mandamus is not only not compelled by *Shives* but is also particularly inappropriate. We therefore decline to expand *Shives* so far afield of the original congressional intent embodied in § 1447(d).

IV.

For the foregoing reasons, we conclude that we lack jurisdiction to hear this case and grant Nordan's motion to dismiss Blackwater's appeal. We also deny Blackwater's petition for a writ of mandamus. Finally, we deny as moot Nordan's motion to strike.

APPEAL DISMISSED; PETITION FOR WRIT OF MANDAMUS DENIED; MOTION TO STRIKE DENIED AS MOOT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

RICHARD P. NORDAN, as Ancillary Administrator for the separate Estates of STEPHEN S. HELVENSTON, MIKE R. TEAGUE, JERKO GERALD ZOVKO and WESLEY J.K. BATALONA, Plaintiff,

v.

BLACKWATER SECURITY CONSULTING, LLC; BLACKWATER LODGE AND TRAINING CENTER, INC., and JUSTIN L. McQUOWN, Defendants.

No. 5:05-CV-48-FL(1)

382 F. Supp. 2d 801

LOUISE W. FLANNIGAN, Chief United States District Judge:

This matter is before the court on defendants' motions to dismiss (DE #'s 5 & 8), and plaintiff's motion to remand (DE # 12). Plaintiff responded in opposition to the motions to dismiss, and defendants responded in opposition to the motion to remand. In this posture, the issues raised are ripe for ruling. For the reasons that follow, the court grants plaintiff's motion to remand and denies as moot defendants' motions to dismiss.

STATEMENT OF THE CASE

Plaintiff commenced this action on January 5, 2005, in the Superior Court of Wake County, North Carolina, asserting claims arising out of the deaths of four security personnel assigned to work in the vicinity of Fallujah, Iraq.

In the complaint, plaintiff asserts two state law claims for wrongful death and fraud.

On January 24, 2005, defendants filed a notice of removal in this court asserting federal question jurisdiction on the basis of "complete preemption" and "unique federal interests." (Notice of Removal, PP 34, 36). On January 31, 2005, defendants Blackwater Security Consulting, LLC, and Blackwater Lodge and Training Center, Inc. ("Blackwater") filed a motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), on the basis of a defense of preemption under the Defense Base Act ("DBA"), and for failure to state a claim. On February 1, 2005, defendant Justin L. McQuown ("McQuown") filed a motion to dismiss, pursuant to Rule 12(b)(6), also asserting a defense of preemption under the DBA or the related Longshore and Harbor Workers' Compensation Act (LHWCA).

On February 11, 2005, plaintiff filed a motion to remand to state court, arguing that the complaint only asserts state law claims, and that the DBA and LHWCA do not completely preempt the asserted claims. On March 7, 2005, defendants responded in opposition to the motion to remand, attaching copies of contracts referenced in the complaint and compensation benefits decisions by the United States Department of Labor, pertaining to the decedents in this action. Plaintiff replied on March 17, 2005, objecting to consideration of evidence outside the complaint, and arguing that neither complete preemption nor unique federal interests served to establish jurisdiction in this case. Plaintiff also responded to defendants' separate motions to dismiss, to which defendants have replied.

STATEMENT OF ALLEGED FACTS

The facts alleged in plaintiff's complaint may be summarized as follows. On March 8, 2004, defendant Blackwater, and another entity, Regency Hotel and Hospital Company ("Regency") entered into a contract ("security contract") with ESS Support Services Worldwide ("ESS") to provide security services "for ESS's catering operations in the Middle East." (Compl., P21). On March 12, 2004, defendant Blackwater entered into a sub-contract ("sub-contract") with Regency, which gave defendant Blackwater control over security details. On March 25, 2004, Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona (hereinafter the "decedents") entered into "Independent Contractor Service Agreements" with Blackwater, which expressly incorporated the terms of the sub-contract and contract.

At the time the decedents entered into the Independent Contractor Service Agreements, Blackwater representatives told them that they would be performing security services in Iraq, with the following precautions mandated by the primary contract:

A. "Each security mission would be handled by a team of no less than six (6) members."

B. "Each security mission would be performed in armored vehicles."

C. "Security teams would be comprised of at least two armored vehicles, with at least three security contractors in each vehicle, which would provide for a driver, a navigator, and a rear-gunner.

D. "The rear-gunner would have a heavy automatic weapon, such as a 'SAW Mach 46,' which could fire up to 850 rounds per minute, allowing the gunner to fight off any attacks from the rear."

E. There would be "at least 24-hours notice prior to any security mission."

F. "Each security detail mission would be subject to a Risk Assessment completed prior to the mission, and that if the threat level was too high, they would have the option of not performing the mission."

G. There would be an "opportunity to review the travel routes, gather intelligence about each mission, do a pre-trip inspection of the route and determine the proper logistics to carry out the security detail."

H. The security detail "would arrive in the Middle East and have at least 21 days prior to any operations to become acclimated to the area, learn the lay of the land, gather intelligence, and learn safe routes through the area."

(Compl., P13). The decedents relied upon these representations in entering into the Independent Contractor Security Agreements.

In preparing decedents for work under the Independent Contractor Security Agreements, Blackwater representatives conducted training and preparation programs for security missions in Iraq. One of the representatives who conducted training, defendant McQuown, "failed to provide adequate training and intelligence data" to decedents, (Compl., P28), and "harbored extreme animosity toward decedent Scott Helvenston relating to Helventson's superior credentials,

abilities, training, education, experience and knowledge." (Compl., P40).

Furthermore, plaintiff alleges that the training programs and preparations provided for decedents were compromised by defendant Blackwater's interest in higher profits. Decedents were not given twenty-one (21) days preparation time prior to operations in Iraq, and, as such, were not permitted to become acclimated to the area, learn the lay of the land, gather intelligence, or learn safe routes through Iraq. Rather, on March 27, 2004 they "were advised that they would be leaving in two days for Baghdad to start their first mission." (Compl., P43). Specifically, although decedent Helvenston was physically ill, defendant McQuown ordered Helvenston to depart for Baghdad at 5:00 a.m. on March 29, 2004, to join the three other decedents for a security mission.

On March 30, 2004, Helvenston, Teague, Zovko and Batalona were directed to conduct a security mission for Blackwater. Pursuant to mission directions, the decedents were required to "escort three ESS flatbed trucks" carrying food supplies, "from the City of Taji to a U.S. Army base in Iraq," known as Camp Ridgeway, on the outskirts of the City of Fallujah. (Comp., PP 21, 57, 59). At the time, Fallujah was "universally known to be extremely hostile territory in control of Iraqi insurgents." (Compl., P59).

Even though the decedents were entering hostile territory, defendant Blackwater failed to provide the decedents with the protections, tools and information that it initially promised to provide. Specifically, a Blackwater representative refused to provide maps of the area and told decedents that it was "too late for maps." (Compl., P55). In addition, defendant did not provide them with the minimum number of six members on the security detail team, although six members were available. Defendant did not provide

them with armored vehicles, and defendant did not permit them to have three team members in each vehicle, which resulted in each vehicle containing only a driver and a navigator, but no rear-gunner to quell any attacks.

Moreover, it is alleged, defendant did not provide them with heavy automatic machine guns, but instead merely with semi-automatic rifles, which had not even been tested or sighted. Likewise, defendant did not provide decedents with twenty-four (24) hours notice or a Risk Assessment prior to the March 30, 2004 security mission. Finally, defendant did not provide them with the opportunity to gather intelligence concerning the travel route or to do a pre-route inspection. In sum, the decedents were obligated to set out on their mission grossly under-prepared for the risks they faced.

Because the decedents "had not been able to perform a pre-trip analysis of their route and [were] denied maps and logistical information concerning the area, they set out toward Camp Ridgeway on a road which led directly through the heart of the hostile Fallujah." (Compl., P60). "Unbeknownst to them, there was an alternative, safer route which led around the outskirts of Fallujah and would have only taken them approximately two and a half hours longer to get to Camp Ridgeway." (Id.).

"Without having any information about the route or even a map of the area, they became lost and ended up driving through the center of the City of Fallujah." (Compl., P17). "While stopped in traffic, several armed Iraqi insurgents walked up behind these two unarmored vehicles and repeatedly shot these four Americans at point blank range, dragged them from their vehicles, beat, burned and disfigured them and desecrated their remains." (Id.). In particular, "two of the burnt bodies were strung up from a

bridge over the Euphrates River for all of the world to see." (Compl., P61).

In support of the wrongful death claim, plaintiff alleges that "when the Defendants sent Helvenston, Teague, Zovko and Batalona out on this security mission in this condition, without the proper protections, tools and information, they knew that they were sending them into the center of Fallujah with very little chance that they would come out alive." (Compl., P70). Plaintiff also alleges that "as a proximate result of the Defendants' intentional conduct, willful and wanton conduct, and/or negligence, as alleged herein above, Helvenston, Teague, Zovko and Batalona . . . were killed March 31, 2004."

In support of the fraud claim, plaintiff alleges that defendants represented that the decedents would receive protections guaranteed by the primary contract, which induced the decedents to enter into the Independent Contractor Service Agreements. Plaintiff further alleges that when defendants made these representations they knew that they were false and concealed true facts with the intent to induce the decedents to enter into the Independent Contractor Service Agreements.

Plaintiff seeks compensatory damages for wrongful death of the decedents, recision of the Independent Contractor Service Agreements, as well as punitive damages from each defendant, including damages for "mental anguish, fear and terror of being forced to travel into the center of Fallujah . . . and the physical pain and suffering of being shot, beaten, burned, tortured and dismembered." (Compl., P93).

DISCUSSION

I. Removal Jurisdiction

The party seeking removal has the burden of establishing federal jurisdiction. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). The court must strictly construe removal jurisdiction, and resolve all doubts in favor of remand. *Id.* The right to remove a case from state to federal court derives solely from 28 U.S.C. § 1441, which provides in relevant part:

> Any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). In this case, there is no allegation of diversity of citizenship between the parties. Accordingly, the propriety of removal depends on whether the suit raises a federal question, that is, whether it is an action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Ordinarily, under the "well-pleaded complaint" rule, a suit raises a federal question "only when the plaintiff's statement of his own cause of action shows that it is based" on federal law. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908). A defense is not part of a plaintiff's properly pleaded statement of his claim. *Rivet v. Regions Bank*, 522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998). Therefore, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption." *Franchise Tax Bd. of*

Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 14, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).

A limited exception to the well-pleaded complaint rule exists where the state law claim has been "completely preempted" by federal law. *Beneficial National Bank v. Anderson*, 539 U.S. 1, 7, 8, 156 L. Ed. 2d 1, 123 S. Ct. 2058 (2003); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987). In such a case, even a complaint that only purports to raise a state law claim may be removed to federal court because it necessarily raises a federal question. *See Beneficial National Bank*, 539 U.S. at 7-8; 10; *Franchise Tax Bd.*, 463 U.S. at 22.

Here, defendants do not dispute that plaintiff's complaint raises only state law causes of action. Defendants argue, however, that the statutory and regulatory scheme of the DBA completely preempts plaintiff's state law claims. In the alternative, defendants argue that this lawsuit concerns a "unique federal interest" in the remedies available to individuals working in support of national defense or war-zone efforts. The court will address each argument in turn.

A. Complete Preemption

A federal statute completely preempts a state law claim if it "provide[s] the exclusive cause of action for the claim asserted" and "set[s] forth procedures and remedies governing that cause of action." *Beneficial National Bank*, 539 U.S. at 8. To have complete preemption, not only must the state law claim come "within the scope of the federal cause of action" created in the statute, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987), but also Congress must have manifested an intent to make the federal cause of action "exclusive."

Beneficial National Bank, 539 U.S. at 9, n.5; *see Metropolitan Life*, 481 U.S. at 66-67 (holding that state law claims which fall within the scope of the federal civil enforcement provision of ERISA were completely pre-empted); *Franchise Tax Bd.*, 463 U.S. 1, 23-24, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (noting that state law claims which fall within the scope of the provision describing federal court procedures and remedies for suits under the LMRA were completely pre-empted); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225, 232 (4th Cir. 1993) (holding that the "grant of exclusive jurisdiction to the federal district courts over civil actions arising under the Copyright Act, combined with the preemptive force of § 301(a) [of the Copyright Act], compels the conclusion that Congress intended" to preempt state law actions).

The Fourth Circuit recently held that there is a "presumption" against complete preemption, and that defendants' burden "is to demonstrate that a federal statute indisputably displaces any state cause of action over a given subject matter." *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005). Specifically, "the congressional intent that the state law be entirely displaced must be clear in the text of the statute." Id. at 441 (citing *Metropolitan Life*, 481 U.S. at 65-66). Reviewing Supreme Court precedent, the court further affirmed that "the *sine qua non* of complete preemption is a pre-existing federal cause of action that can be brought in the district courts." *Id.* at 442. Accordingly, "Congress's allocation of authority to an agency and away from district courts defeats a complete preemption claim." *Id.* at 443.

With these principles in mind, the court turns to an analysis of whether the DBA completely preempts state law claims falling within its scope. The DBA is a federal statute that incorporates and extends the comprehensive worker's compensation scheme established by the Longshore and

Harbor Worker's Compensation Act (LHWCA) to select forms of employment outside of the United States. *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000). In relevant part, the DBA provides:

> Except as herein modified, the provisions of the [LHWCA] as amended, shall apply in respect to the injury or death of any employee engaged in any employment -
>
> * * *
>
> under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work. . . .

42 U.S.C. § 1651(a). By reference, the LHWCA provides for the exclusivity of remedy against a qualifying employer for injury or death:

> The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

33 U.S.C. § 905(a). In addition to this LHWCA exclusion provision, the DBA expressly excludes liability to employers under "the workmen's compensation law of any state." 42 U.S.C. § 1651(c).

In place of recovery under state worker's compensation and tort law, the liability of an employer for the death of an employee under the DBA is limited to statutory death benefits. *See* 33 U.S.C. § 904(a) (referencing § 909, death benefits). These include funeral expenses and monthly payments set according to a statutory percentage rate of average wages of the decedent. *See* 33 U.S.C. § 909 (a)-(b).

The DBA provides a comprehensive federal framework for adjudication and administration of claims for statutory death benefits. Specifically, a claim must be filed with the United States Department of Labor:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefore is filed within one year after the injury or death. . . . Such claim shall be filed with the deputy commissioner [of the Department of Labor] in the compensation district in which such injury or death occurred.

33 U.S.C. 913(a). Jurisdiction over such claims is vested exclusively with United States Secretary of Labor:

> a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission [Secretary of Labor] at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

33 U.S.C. § 919(a); *see also* § 939(a) (providing that the "Secretary [of Labor] shall administer the provisions of this Act.").

In turn, the statute sets out a detailed procedure by which the Secretary of Labor must adjudicate claims for compensation:

> (b) Notice of claim. Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the commission [Secretary of Labor], shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.
>
> (c) Investigations; order for hearing; notice; rejection or award. The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice if given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.
>
> (d) Provisions governing conduct of hearing; administrative law judges. Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of

> section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a [an] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [Oct. 27, 1972], in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 919. In other words, the Secretary of Labor, through a deputy commissioner or administrative law judge, is responsible for making an initial order rejecting a claim or making an award of compensation. *See* 33 U.S.C. § 919(c). "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 [33 USCS § 919], and, unless proceedings for the suspension or setting aside of such order are instituted, . . . shall become final at the expiration of the thirtieth day thereafter." 33 U.S.C. § 921(a).

Proceedings for review of compensation orders must begin with an appeal to the United States Department of Labor Benefits Review Board:

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole . . . .

> The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action.

33 U.S.C. § 921(b). Finally, "any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." § 921(c).

Upon review of the exclusive comprehensive scheme set out by the DBA for compensation claims, the court is compelled to find that the DBA does not completely preempt state law claims. As the Fourth Circuit recently reiterated, "the sine qua non of complete preemption is a pre-existing federal cause of action that can be brought in the district courts." *Lontz*, 413 F.3d at 442 (emphasis added). Notably missing from the DBA statutory scheme is any provision for a "federal cause of action that can be brought in the district courts." *Id.* Rather, as noted above, the DBA provides for the exclusive filing of a claim for wrongful death benefits with the Secretary of Labor, the adjudication of such claims by a deputy commissioner or administrative law judge, the review of claims by the Benefits Review Board, and appellate review by a federal court of appeals. *See* 42 U.S.C. § 1651(a), 33 U.S.C. §§ 913, 919, 921. United States District Courts are not involved in the claims adjudication process. *See id.* Consequently, this court lacks subject matter jurisdiction to consider plaintiff's claims, however much they involve coverage issues under the DBA. *See Lontz*, 413 F.3d at 443 ("Congress's allocation of authority to a agency and away from district courts defeats a complete preemption claim.").

In their argument, defendants cite several cases holding that either the DBA or LHWCA provides a sweeping defense of preemption against state tort claims. *See e.g., Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464 (1st Cir. 2000); *Smither & Co. v. Coles*, 100 U.S. App. D.C. 68, 242 F.2d 220 (D.C. Cir. 1957); *Pulley v. Peter Kiewit Son's Co.*, 223 F.2d 191 (7th Cir. 1955); *Schmidt v. Northrop Grumman Systems, Corp.*, 2005 U.S. Dist. LEXIS 24688, No. 3:04-CV-042-JTC (unpublished, *attached to* Def's Notice of Subsequently Decided Authority) (N.D. Ga., March 2, 2005); *Colon v. United States Dep't of Navy*, 223 F. Supp. 2d 368 (D.P.R. 2002).

These cases, however, are inapposite to the question of removal jurisdiction through complete preemption, and concern only the defense of preemption. *See Davila-Perez*, 202 F.3d at 468 (dismissing action originally filed in federal district court on grounds that DBA administrative scheme provided exclusive remedy); *Smither & Co.*, 242 F.2d at 221, 223 (same); *Pulley*, 223 F.2d at 192 (dismissing negligence claims as preempted by the DBA); *Schmidt*, No. 3:04-CV-042-JTC (dismissing plaintiff's tort claims filed in federal court due to preemption under the DBA); *Colon*, 223 F. Supp. 2d at 370 (same). Regardless of whether the comprehensive federal compensation scheme set up by the DBA defensively preempts any and all state law claims for death benefits, defensive preemption does not act to establish federal district court jurisdiction over state law claims. *See Franchise Tax Bd.*, 463 U.S. at 14 ("[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption."); *Aaron v. Nat'l Union Fire Ins. Co.*, 876 F.2d 1157, 1166 (5th Cir. 1989) (rejecting argument that LHWCA completely preempts state claims, without reaching the question of defensive preemption).

Defendants also cite to *Shives v. CSX Transportation*, 151 F.3d 164 (4th Cir. 1998), in which the Fourth Circuit discussed preemption under the LHWCA. Although *Shives* is an important case bearing on the final disposition of this case in federal district court, it provides no assistance to defendants on the complete preemption issue. Indeed, the court's discussion in *Shives* only further undermines defendants' argument in favor of complete preemption.

In *Shives*, plaintiff brought suit in state court asserting a Federal Employers' Liability Act (FELA) claim regarding an injury suffered while unloading a flatbed rail car at an intermodal marine terminal. 151 F.3d at 166. Although federal statute expressly precluded removal of the FELA claim, defendant removed on grounds that the LHWCA, rather than FELA, covered plaintiff's injuries. *Id.* Upon review of the motion to remand by plaintiff, the district court found that plaintiff's injuries were not covered under the LHWCA, and remanded to state court. *Id.* at 167. The court of appeals, however, vacated the judgment of the district court, noting that "interpretation of the LHWCA is a matter for the federal executive and federal appeals courts." 151 F.3d at 167. In addition, the court undertook its own analysis of the coverage issue and concluded that plaintiff's injuries were covered under the LHWCA. *Id.* at 171. Given the limited statutory jurisdiction over LHWCA claims, the court of appeals directed outright dismissal of the action for lack of subject matter jurisdiction, so that the plaintiff could "proceed through the administrative process" rather than a civil action in state or federal district courts. *Id.*

Shives undermines defendants' argument in favor of complete preemption, by confirming that even a claim falling under the scope of the LHWCA "is not an action over which the district courts have original jurisdiction." *Shives*, 151 F.3d at 171. Rather, such a claim can "only be filed in the

first instance with the Secretary of Labor." *Id.* Accordingly, where the DBA (incorporating the LHWCA) does not provide a cause of action in the federal district courts, removal based upon complete preemption by the DBA is foreclosed. *See Lontz*, 413 F.3d at 442, 443; *Rosciszewski*, 1 F.3d at 232 (noting "grant of exclusive jurisdiction to the federal district courts" in finding complete preemption). Indeed, the court in *Shives* anticipated this result by noting that, even though plaintiff's claim fell under LHWCA, it was "not removable under 28 U.S.C. § 1441(b)." *Id.*

In sum, defendants' argument that this case is removable by virtue of complete preemption under the DBA is without merit.

B. Unique Federal Interest

As an alternative basis for removal jurisdiction, defendants argue that this lawsuit presents a "unique federal interest," specifically concerning the remedies available to individuals working in support of national defense or war-zone efforts. (Blackwater Def's Mem. in Opp. to Remand, p. 17; Def. McQuown Mem. in Opp. to Remand, pp. 16, 17). In response, plaintiff argues that a "unique federal interest" is not, in itself, a viable ground for removal jurisdiction. Under the circumstances presented by this case, the court finds that defendants' asserted "unique federal interest" is insufficient to confer federal jurisdiction.

The sole case upon which defendants rely that applied the "unique federal interest" doctrine for purposes of removal jurisdiction is *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993). In *Caudill*, plaintiff received health insurance benefits as a federal employee under an insurance policy provided by defendant, which provided insurance to government employees

"pursuant to the Federal Employees Health Benefits Act." *Caudill*, 999 F.2d at 76. Under the statutory framework then in place, benefits decisions were decided by the United States Office of Personnel Management. *Id.* In *Caudill*, plaintiff brought an action in state court, based upon breach of contract, seeking to enjoin defendants from notifying a hospital that defendant did not provide coverage for the specific treatment she sought. *Id.* Defendant filed a notice of removal, asserting federal jurisdiction on grounds of complete preemption, and on grounds that the action "arises from a federal contract, giving rise to a uniquely federal interest so important that the 'federal common law' supplants state law." *Id.* at 77.

Upon motion to remand in *Caudill*, the Fourth Circuit did not analyze the complete preemption issue, but rather agreed with defendant that the case fell within a narrow category of cases presenting a "'uniquely federal interest' so important that the 'federal common law' supplants state law either partially or entirely regardless of Congress' intent to preempt the area involved." *Caudill*, 999 F.2d at 77 (citing *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988)). In reaching this conclusion, the court noted that "the federal government is a party to the contract" with health insurers, and that federal common law was in significant conflict with state law. *Id.* at 78.

Although *Caudill* remains binding precedent in this Circuit, the case has been criticized on the issue of removal jurisdiction. Importantly, the primary Supreme Court case upon which Caudill derived its analysis, *Boyle v. United Tech. Corp.*, did not address the question of removal jurisdiction, but rather only addressed the defense of preemption in a case that had been brought in Federal District Court. *See Boyle*, 487 U.S. at 502. Concerning this distinguishing factor, the Second Circuit noted recently:

> The Caudill court conflated the preemption and jurisdiction analyses by holding that a significant conflict with uniquely federal interests was sufficient to confer subject matter jurisdiction on the federal court. *See* 999 F.2d at 78-79. We agree with the criticism Caudill has received for giving short shrift to the well-pleaded complaint rule. *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 314-15 (3d Cir. 1994) (rejecting *Caudill*'s reasoning); 15 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 103.45[3][c] (3d ed. 2004) (commenting that Caudill is "fatally flawed if the validity of the well-pleaded complaint rule . . . [is] accepted").

Empire Healthchoice Assur., Inc. v. McVeigh, 396 F.3d 136, 142-143 (2d Cir. 2005); *see also Reveal v. Stinson*, 115 F. Supp. 2d 688, 691 (D. W. Va. 2000) ("*Caudill* has been roundly criticized by courts and commentators as an aberration.").

Moreover, after *Caudill* was decided, the Supreme Court has stated without qualification that "a state claim may be removed to federal court in only two circumstances - when Congress expressly so provides . . . or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 156 L. Ed. 2d 1, 123 S. Ct. 2058 (2003) (emphasis added). In addition, Fourth Circuit analysis of removal jurisdiction more recent than Caudill is consistent with this Supreme Court approach. In *Lontz*, the court noted that a case may be removed to federal court only on three separate grounds: 1) diversity jurisdiction, 2) a federal question as "an element, and an essential one, of the plaintiff's cause of action," or 3) complete preemption.

Lontz, 413 F.3d at 439, 440. Notably missing from the court's discussion was any mention of "unique federal interest" as a basis for removal jurisdiction.

This more recent precedent provides reason to doubt whether removal on the basis of "unique federal interests," outside the specific facts of Caudill, is proper. Given the questionable authority of Caudill, well-established precedent requires resolution of such doubt in the favor of remand. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994).

Moreover, even assuming that "unique federal interests" may provide a basis for jurisdiction in some cases, application of such doctrine here is unavailing. In this case, the Blackwater defendants claim that this case involves a unique federal interest "in the remedies available to individuals killed or injured working under federal prime, subcontracts, and subordinate contracts in support of national defense or war zone efforts." (Blackwater Def's Mem. in Opp. to Remand, pp. 17-18). In similar terms, defendant McQuown claims that the "DBA advances a unique federal interest . . . to provide uniformity and certainty in the availability of compensation of injured non-military employees . . . performing public work," and that this federal interest in an exclusive DBA remedy is raised by plaintiff's claims. (Def. McQuown Mem. in Opp. to Remand, pp. 17).

This asserted unique federal interest, however, being based upon coverage under the DBA, assumes the very conclusion which this court lacks jurisdiction to reach, namely that the decedents in this case are covered as employees under the DBA. As discussed above, pursuant to *Shives*, although this issue is plainly a federal question, it is not an issue which this court has jurisdiction to address. *See Shives*, 151 F.3d at 167 (stating that the "question of whether

the LHWCA applies to a workrelated injury is exclusively a federal question . . . for the federal executive and federal appeals courts" to resolve).

Moreover, this case does not present circumstances which fall under the "unique federal interest" test as applied by the court in *Caudill*. Unlike in *Caudill*, plaintiff's cause of action does not involve the direct interpretation of "a federal contract," such that "federal common law" supplants state law. *See Caudill*, 999 F.2d at 77. Indeed, the application of "federal common law" is not even asserted by defendants in this case. Rather, defendants assert a federal interest in "the remedies" that are available to individuals killed while working in war-zones. (Blackwater Def's Mem. in Opp. to Rem., p. 17; *see also* Def. McQuown's Mem. in Opp. to Rem., p. 18). The determination of such remedies depends upon coverage under the DBA, which is not a federal contract, but rather a federal statute. While there is no doubt that there exists a federal interest in uniform application of the DBA, this interest is not sufficient to provide removal jurisdiction.

In summary, under the circumstances of this case, this court lacks subject matter jurisdiction over this cause of action, whether asserted on the basis of complete preemption or "unique federal interests." Having found no basis for subject matter jurisdiction the court turns to the remaining question of the ultimate disposition of this case.

II. Disposition

Concerning the proper procedure following removal, 28 U.S.C. § 1447(c) provides that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Accordingly, where the court finds no basis for

subject matter jurisdiction, § 1447(c) compels the court to remand this action to state court.

In opposition to remand, defendants raise an important point concerning the disposition in *Shives* following removal which must be addressed here. In *Shives* the court recognized that the "question of whether the LHWCA applies to a workrelated injury is . . . [a] question which Congress never intended for state courts to resolve." *Shives*, 151 F.3d at 167. Rather, any "interpretation of the LHWCA is a matter for the federal executive and federal appeals courts." *Id.* Accordingly, after finding that the LHWCA applied to the facts of that case, the Fourth Circuit noted that, regardless of whether the district court lacked jurisdiction upon removal, remand to the state court was not proper. *See id.* at 171. Specifically, the court explained:

> While the only intuitive remedy might nevertheless be to remand this case to the state court to decide the coverage question, if we were to do so, we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court. In the peculiarities of this case, we believe that the district court should not have remanded the case to state court, but should have dismissed it. Accordingly, we vacate the district court's remand order and remand this case to the district court with instructions to dismiss the case for lack of subject matter jurisdiction. In this way, [plaintiff] will be able to proceed through the administrative process before the Department of Labor with his protectively filed LHWCA claim.

Shives, 151 F.3d at 171 (emphasis added).

At first blush, where this court, like the court in *Shives*, is facing a "federal question of LHWCA coverage," *Shives* 151 F.3d at 167, it appears that the appropriate course of action is to dismiss the action outright for lack of subject matter jurisdiction rather than remand to the state court. Such a disposition, however, is premature. Notably, in *Shives*, the Fourth Circuit directed dismissal only after that court, sitting as a federal court of appeals, had determined the coverage issue under the LHWCA. Specifically, the Fourth Circuit devoted several pages of its opinion to discussing the question of coverage under the LHWCA. *See* 151 F.3d at 167-171. Although the Fourth Circuit in Shives was in a position to resolve the question of coverage, "a matter for the federal executive and federal appeals courts," *id.* at 167, this court is not. Accordingly, where this case is distinguishable from *Shives*, remand, rather than dismissal for lack of subject matter jurisdiction, is proper.

Lacking jurisdiction, this court does not reach defendants' arguments in support of dismissal for failure to state a claim, under Federal Rules of Civil Procedure 12(b)(6) and 9(b). Finally, finding the jurisdictional issues raised by this case to be novel and complex, the court rejects plaintiff's argument in favor of attorney's fees and costs resulting from removal. *See In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996) (rejecting request for attorney's fees where basis for remand is not "obvious").

CONCLUSION

Based upon the foregoing, the court GRANTS plaintiff's motion to remand, pursuant to 28 U.S.C. § 1447(c). (DE # 12). Where the court lacks subject matter jurisdiction over this action, the court DENIES AS MOOT defendants' motions to dismiss brought under Federal Rules of Civil Procedure 12(b)(6) and 9(b). (DE #'s 5 & 8). This case is

hereby REMANDED to the Superior Court of Wake County, North Carolina. The Clerk is DIRECTED to serve a copy of this order on the Clerk of Superior Court of Wake County, North Carolina.

SO ORDERED, this 11th day of August, 2005.

LOUISE W. FLANAGAN

Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

In Re: BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation,

Petitioners.

IN RE: JUSTIN L. MCQUOWN,
Petitioner.

RICHARD P. NORDAN, as Ancillary Administrator for the separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona,

Plaintiff-Appellee,

and

ESTATE OF STEPHEN S. HELVENSTON;
ESTATE OF MIKE R. TEAGUE;
ESTATE OF JERKO GERALD ZOVKO;
ESTATE OF WESLEY J.K. BATALONA,

Plaintiffs,

v.

BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation,

Defendants-Appellants,

and

JUSTIN L. MCQUOWN, an individual; THOMAS POWELL,

Defendants.

RICHARD P. NORDAN, as Ancillary Administrator for the separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona,

Plaintiff-Appellee,

and

ESTATE OF STEPHEN S. HELVENSTON; ESTATE OF MIKE R. TEAGUE; ESTATE OF JERKO GERALD ZOVKO; ESTATE OF WESLEY J.K. BATALONA,

Plaintiffs,

v.

JUSTIN L. MCQUOWN, an individual, Defendant-Appellant, and BLACKWATER SECURITY CONSULTING, LLC, a Delaware Limited Liability Company; BLACKWATER LODGE AND TRAINING CENTER, INCORPORATED, a Delaware Corporation; THOMAS POWELL,

Defendants.

Filed September 28, 2006

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IT IS FURTHER ORDERED that the amici motions filed by AIG, Professional Services Council, the International Peace Operations Association and Kellogg Brown & Root Services, Incorporated, for leave to file briefs in support of the petition for rehearing and rehearing en banc are denied.

Entered for a panel composed of Judge Shedd, Judge Duncan, and Judge Jones, Chief U. S. District Court Judge, sitting by designation.

For the Court,

/s/ Patricia S. Connor
CLERK

THE DEFENSE BASE ACT

Title 42
The Public Health and Welfare

Chapter 11
Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases Outside the United States

42 U.S.C. § 1651
Compensation Authorized

(a) Places of employment. Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment--

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including [the Philippine Islands;] the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including [the Philippine Islands;] the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate

subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

(4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this Act, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

(5) under a contract approved and financed by the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954, as amended (other than title II of chapter II thereof unless the Secretary of Labor, upon the recommendation of the head of any department or other agency of the United States, determines a contract financed under a successor provision of any successor Act should be covered by this section), and not otherwise within the coverage of this section, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (A) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in work under such contract the payment of compensation and other benefits under the provisions of this Act, and (B) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

(6) outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to

appropriate authorization by the Secretary of Defense.

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

(b) Definitions. As used in this section—

(1) the term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project;

(2) the term "allies" means any nation with which the United States is engaged in a common military effort or with which the United States has entered into a common defensive military alliance;

(3) the term "war activities" includes activities directly relating to military operations;

(4) the term "continental United States" means the States and the District of Columbia.

(c) Liability as exclusive. The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this Act

shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this Act, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

(d) "Contractor" defined. As used in this section, the term "contractor" means any individual, partnership, corporation, or association, and includes any trustee, receiver, assignee, successor, or personal representative thereof, and the rights, obligations, liability, and duties of the employer under such Longshoremen's and Harbor Workers' Compensation Act shall be applicable to such contractor.

(e) Contracts within section; waiver of application of section. The liability under this Act of a contractor, subcontractor, or subordinate contractor engaged in public work under subparagraphs (3) and (4), subdivision (a) of this section, and the conditions set forth therein, shall become applicable to contracts and subcontracts heretofore entered into but not completed at the time of the approval of this Act [approved Aug. 16, 1941], and the liability under this Act a contractor, subcontractor, or subordinate contractor engaged in performance of contracts, subcontracts, or subordinate contracts specified in subparagraph (5), subdivision (a) of this section, and the conditions set forth therein, shall hereafter be applicable to the remaining terms of such contracts, subcontracts, and subordinate contracts entered into prior to but not completed on the date of enactment of any successor Act to the Mutual Security Act of 1954, as amended, and contracting officers of the United States are authorized to make such modifications and amendments of existing contracts as may be necessary to bring such

contracts into conformity with the provisions of this Act. No right shall arise in any employee or his dependent under subparagraphs (3) and (4), subdivision (a) of this section, prior to two months after the approval of this Act [approved Aug. 16, 1941]. Upon the recommendation of the head of any department or other agency of the United States, the Secretary of Labor, in the exercise of his discretion, may waive the application of this section with respect to any contract, subcontract, or subordinate contract, work location under such contracts, or classification of employees. Upon recommendation of any employer referred to in clause (6) of subsection (a) of this section, the Secretary of Labor may waive the application of this section to any employee or class of employees of such employer, or to any place of employment of such an employee or class of employees.

(f) Liability to prisoners of war and protected persons. The liability under this Act of a contractor, subcontractor, or subordinate contractor engaged in public work under paragraphs (1), (2), (3), and (4), subsection (a) of this section or in any work under subparagraph (5) subsection (a) of this section does not apply with respect to any person who is a prisoner of war or a protected person under the Geneva Conventions of 1949 and who is detained or utilized by the United States.

42 U.S.C. § 1652
Computation of benefits;
application to aliens and nationals

(a) The minimum limit on weekly compensation for disability, established by section 6(b) [33 USCS § 906(b)], and the minimum limit on the average weekly wages on which death benefits are to be computed, established by section 9(e) [33 USCS § 909(e)], of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4,

1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under section 8(c)(21) of the Longshoremen's and Harbor Workers' Compensation Act [33 USCS § 908(c)(21)], or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission [Secretary of Labor] may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission [Secretary of Labor].

42 U.S.C. § 1653
Compensation districts; judicial proceedings

(a) The United States Employees' Compensation Commission [Secretary of Labor] is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the United States Employees'

Compensation Committee [Secretary of Labor] may deem necessary.

(b) Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Ac shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. § 1654
Persons excluded from benefits

This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916 (39 Stat. 742), as amended [5 USCS §§ 8101 et seq.] (2) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

(3)

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CLERK

No. 06-857

IN THE

Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,

Petitioners,

v.

RICHARD P. NORDAN, *etc.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT RICHARD P. NORDAN

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SUMMARY OF REASONS TO DENY THE PETITION

Following Blackwater's removal of this case, the District Court found it lacked subject matter jurisdiction and remanded it back to the state court, pursuant to 28 U.S.C. § 1447(c). Blackwater appealed, and the Fourth Circuit dismissed the appeal, since 28 U.S.C. § 1447(d) prohibits appellate review of a remand order based on lack of subject matter jurisdiction.

There are no compelling reasons to grant Blackwater's Petition, as required by Supreme Court Rule 10. The Petition does not call into controversy any stated rule of law, nor present a decision which conflicts with decisions of this Court or any other federal court. Instead, Blackwater is simply discontent with the manner in which the well-settled law applies. Simply put, Blackwater requests preferential treatment of its case, in a manner different than what is prescribed by the laws set forth by Congress and interpreted by the courts.

The Petition requests (1) a resurrection of the derivative jurisdiction doctrine abolished by Congress in 1986 [28 U.S.C. § 1441(e)], and (2) the creation of a new exception to 28 U.S.C. § 1447(d) which prohibits review of a remand order based on lack of subject matter jurisdiction. Both requests ask this Court to judicially modify the express rules of law enacted by Congress to benefit Blackwater's defense in this case. Respondent respectfully submits that these Congressional enactments should not be rewritten to assist Blackwater in escaping liability for causing the deaths of four Americans.

First, despite Congress having expressly abolished the derivative jurisdiction doctrine in 1986 by its amendment to 28 U.S.C. § 1447(e), Blackwater asks this Court to breathe life back into the doctrine to support its argument that although the District Court lacks subject matter jurisdiction over this case, it should have dismissed the case instead of remanding it. If the derivative jurisdiction doctrine is revived, Blackwater contends that the District Court could not have remanded the case, because the state court lacks jurisdiction.

The flaw with this argument (in addition to the fact that the doctrine has been abolished) is that it assumes, without establishing, that the state court lacks jurisdiction over the case. Blackwater *contends* that the state court lacks jurisdiction because the worker's compensation law under the Defense Base Act [42 U.S.C. § 1651] provides for an exclusive remedy and bars suit for damages. However, the fundamental problem with Blackwater's argument lies in the fact that the applicability of the DBA has never been decided in this case. At this point, the exclusive remedy provision of the DBA is merely a theoretical defense being asserted by Blackwater, nothing more. Both of the lower courts recognized that the determination of coverage under the DBA has not been decided.

Without a determination of the applicability of the DBA to this case, Blackwater cannot establish that the state court lacks jurisdiction. Without establishing that the state court lacks jurisdiction, Blackwater cannot establish that the District Court should have dismissed the case under the derivative jurisdiction doctrine, instead of remanding it. Without establishing that the derivative jurisdiction doctrine would even apply to this case, there is no reason for this Court to review Blackwater's request to resurrect it from the abolition by Congress.

Second, for more than 100 years, this Court has found that an order remanding an action to state court for lack of subject matter jurisdiction is not reviewable by appeal, mandamus, or otherwise. Nonetheless, Blackwater asks this Court to find that this prohibition against appellate review (enacted by Congress in 1887 and upheld by this Court for the past century) should be modified to accommodate Blackwater's defense in this case. There is no controversy or split among the federal Circuits concerning the application of 28 U.S.C. § 1447(d). Instead, Blackwater is simply discontent with the proper application of Section 1447(d)[1], which results in this case being litigated in state court.

---

1. All statutory references are to Title 28 of the United States Code, unless otherwise indicated.

In all, there are no compelling reasons which would justify granting the instant Petition. Blackwater's two issues are fundamentally flawed, in that they are exclusively premised on findings of facts which do not exist and the application of an alleged defense under the DBA which has not yet been determined. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Here, there are *no* factual findings relating to Blackwater's alleged defense under the DBA and no contention that any of the relevant rules of law are not properly stated—just Blackwater's argument that they were misapplied. Hence, Respondent respectfully contends that there are no compelling reasons for granting the instant Petition.

STATEMENT OF THE CASE

A. Facts Regarding the Underlying Action.

On January 5, 2005, Plaintiff Richard P. Nordan, as Ancillary Administrator for the separate Estates of Scott S. Helvenston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona, filed a Complaint in North Carolina Superior Court, Wake County, alleging two state law causes of action for wrongful death and fraud. The Complaint alleges a detailed set of facts regarding Blackwater's intentional conduct in causing the deaths of Scott S. Helvenston, Mike R. Teague, Jerko Geraldo Zovko, and Wesley J.K. Batalona ("Decedents"), as well as Blackwater's intentional conduct of fraudulently inducing the Decedents to enter into their respective Independent Contractor Service Agreements.

The Complaint also alleges facts concerning certain contracts under which the Decedents were performing work for Blackwater. Essentially, the Decedents were working for Blackwater to provide private security escorts for the catering services of two *foreign* corporations: ESS Support Services Worldwide ("ESS"), a Cyprus corporation and Regency Hotel and Hospital Company ("Regency"), a Kuwaiti company. [Compl.7]

The factual allegations contained in the Complaint give rise to two state law causes of action for wrongful death and fraud. Blackwater made false representations to the Decedents to induce them to enter into their respective Independent Contractor Service Agreements, and travel to Iraq and surrounding countries to provide private security services for ESS's catering division. The Decedents entered into their respective Independent Contractor Service Agreements in reliance on Blackwater's representations that they would be provided with certain protections, tools and information to allow them to perform their jobs and to secure their safety.

More specifically, the Decedents were told by Blackwater that:

A. Each security mission would be handled by a team of no less than six members;

B. Each security mission would be performed in armored vehicles;

C. The security teams would be comprised of at least two armored vehicles, with at least three security contractors in each vehicle, which would provide for a driver, a navigator and a rear gunner;

D. The rear gunner would have a heavy automatic weapon, allowing the gunner to fight off any attacks from the rear;

E. They would be given at least 24-hours notice prior to any security mission;

F. Each security mission would be subject to a Risk Assessment completed prior to the mission and that if the threat level was too high, they would have the option of not performing the mission;

G. They would be afforded the opportunity to review the travel routes, gather intelligence about each mission, do a pre-trip inspection of the route and determine the proper logistics to carry out the security detail; and

H. They would arrive in the Middle East to have at least 21 days prior to any operations to become acclimated

> to the area, learn the lay of the land, and gather intelligence and learn safe routes in the area. [Pet. App. 35a-36a]

Nevertheless, in an effort to cut costs and improve its bottom line, corporate Blackwater did not provide the Decedents with these promised protections, tools or information. From Baghdad, the Decedents were sent on a security mission *prior to* the commencement date of the contract with ESS. The Decedents were sent out on this security mission without the required six-man team, without armored vehicles, without a rear gunner in each vehicle, without heavy machine weapons, without a Risk Assessment, without a pre-trip inspection of the route, and without even so much as a map of the area. [Compl. ¶15] With three empty ESS flatbed trucks in their charge, the Decedents ultimately became lost, and ended up driving through the center of Fallujah. [Compl. ¶16] This was at a time when even the U.S. military would not travel into the heart of Fallujah. [Compl. ¶17]

As the Decedents were lost, without the needed protections, tools or information that Blackwater had represented they would have, the Decedents were ambushed by insurgents in Fallujah, who literally walked up behind the vehicles and shot all four men with small arms at close range. [Compl. ¶17] Their bodies were pulled into the streets and burned, and their charred remains were beaten and dismembered. Ultimately, two of the burnt bodies were strung up from a bridge over the Euphrates River for all the world to see. *Id.*

Based on the factual allegations contained in the Complaint, the action does not state a claim "arising under" the Constitution, a treaty or any law of the United States. Instead, the Complaint strictly alleges two state law causes of action against an American corporation, over which the federal courts lack jurisdiction to consider.

B. The Proceedings Below.

Shortly after the Complaint was filed in North Carolina state court, Blackwater removed the case to federal court on January 24, 2005, pursuant to 28 U.S.C § 1441. Blackwater contended that there exists original jurisdiction under 28 U.S.C. § 1331 because its federal defense under the Defense Base Act ("DBA") provides for complete preemption of state law. Following removal, Blackwater moved to dismiss the case, claiming that the exclusive remedy provision of the DBA forecloses any suit for damages.

Respondent Richard P. Nordan, as the administrator of the Decedents' estates, filed a motion for remand, arguing that the District Court was without subject matter jurisdiction over the case, since the Complaint contained two state law causes of action for wrongful death and fraud and since an anticipated defense, even one of federal preemption, does not create removal jurisdiction. Respondent also argued that the DBA does not provide for "complete preemption," which might otherwise create federal removal jurisdiction based on an anticipated defense.

In a well-reasoned decision, Chief United States District Court Judge Louise W. Flannigan granted the motion for remand. The District Court noted that under the "well-pleaded complaint" rule, a federal question must arise out of the plaintiff's own claims and not from an anticipated defense. [Pet. App. 40a] Following a detailed analysis, the District Court found that the DBA does not provide for "complete preemption," for the purpose of the exception to the well-pleaded complaint rule. [Pet. App. 41a-50a]

Finding a lack of subject matter jurisdiction, the District Court followed the mandate of 28 U.S.C. § 1447(c), which requires remand. Having no subject matter jurisdiction over the case, the District Court denied Blackwater's motions to dismiss, as moot. [Pet. App. 56a]

Blackwater sought appellate review of the remand order to the Fourth Circuit Court of Appeals, by filing an appeal and a

petition for writ of mandamus. Respondent filed a motion to dismiss for lack of appellate jurisdiction, in that 28 U.S.C. § 1447(d) expressly prohibits appellate review of a remand order based on lack of subject matter jurisdiction. Blackwater opposed the motion to dismiss by arguing that the District Court made a substantive ruling that was "severable" from the remand order itself, which would remove it from the bar of Section 1447(d). Blackwater also argued (for the first time on appeal) that the matter was removable under the federal officer and agency provision of 28 U.S.C. § 1442, despite not having actually removed the case on that ground, nor having argued for removal jurisdiction under Section 1442 at the District Court.

The Fourth Circuit found the "severable order" exception to Section 1447(d) did not apply, because the District Court made no rulings as to the substantive rights of Blackwater, but instead only analyzed the issue of its own jurisdiction, and after finding it lacked jurisdiction, remanded the case. The Fourth Circuit also found that the District Court did not err in remanding the case instead of dismissing it, since the very issue that Blackwater argued as the ground for dismissal (coverage under the DBA) was never actually decided. [Pet. App. 24a] Determining that it was without appellate jurisdiction pursuant to 28 U.S.C. § 1447(d), the Fourth Circuit dismissed Blackwater's appeal and denied its petition for writ of mandamus.

Blackwater subsequently filed petitions for rehearing and rehearing en banc. Both were denied. [Pet. App. 60a] Blackwater then filed a motion to stay the issuance of the mandate pending its petition for certiorari to this Court. The Fourth Circuit denied said motion to stay. Finally, Blackwater filed an application to this Court for a stay of the trial court proceedings pending determination of its Petition. The Chief Justice denied the application.

Despite the two-year delay caused by Blackwater's improper removal and appeal, the case is now beginning to move forward. Respondent is in the process of conducting discovery

and Blackwater has filed its motion to dismiss based on the Defense Base Act.

REASONS FOR DENYING THE PETITION

While Blackwater presented the issue of the applicability of Section 1447(d) as the *second* Question, it should be the primary and threshold issue. If the Fourth Circuit did not err in finding it lacked appellate jurisdiction to hear the case, there is nothing for this Court to consider. Put another way, if Section 1447(d) prohibits review of a remand order based on lack of subject matter jurisdiction, even if erroneously decided, it is immaterial that the District Court remanded the case instead of dismissing, because the issue is not reviewable. It is only after appellate jurisdiction is established that the propriety of the remand order could be considered.

This is not to say that either the Fourth Circuit or the District Court erred, but instead simply a suggestion as to the proper order in which the issues should be considered. Therefore, the Respondent will address Blackwater's Questions Presented in reverse order.

I. The Petition Rests Exclusively on Non-Existent Factual Findings and an Undetermined Question of Law.

As a preliminary matter, it should be noted that both Questions Presented by Blackwater are premised on (1) a fact that has not been decided, and (2) a legal coverage decision that has not been made. More specifically, all of the legal and policy arguments made by Blackwater are built on the *alleged* fact that Blackwater was working for the U.S. military at the time of the subject incident and on the *alleged* claim that the deaths are covered by the Defense Base Act. Both the Fourth Circuit and the District Court below expressly stated that these issues have *not* been resolved:

> The district court made no DBA coverage decision that might form the basis of our review. * * * The fact that the district court's order made no determination of DBA coverage has significance beyond serving to distinguish

> the facts before us from those in *Shives*. * * * Here, the district court made no determination with respect to whether the DBA covered Nordan's claims. [Pet. App. 20a-21a]

Despite the determination of coverage under the DBA remaining an open and highly contested issue (which weighs in favor of *no* coverage), both Questions Presented are strictly based on an *assumption* that the DBA applies. First, Blackwater's request that this Court create a new "constitutional question" exception to the bar against appellate review prescribed Section 1447(d) is expressly premised on the assumption that the DBA applies, which would be the "constitutional question" at issue. If the DBA does not apply, there is no constitutional question at issue and no need for the Court to chip away at Section 1447(d).

Second, Blackwater's argument that the derivative jurisdiction doctrine should be revived (despite is abolition by Congress) is premised on the assumption that the DBA applies, from which Blackwater argues that the state court has no jurisdiction over the case, and the District Court should have dismissed it, instead of remanding. In any event, it is critical to note that each of Blackwater's Questions Presented are strictly premised on the assumption that there exits coverage under the DBA—a finding that both of the lower courts expressly stated does not exist. Therefore, if this Court does not make, in the first instance, the factual finding that Blackwater was working for the U.S. military at the time of the subject incident *and* the legal coverage decision under the DBA, Blackwater's arguments fail and there is not a single ground upon which to grant the Petition.

Since this Court does not generally make such factual findings and legal determinations of worker's compensation coverage in the first instance (especially as here where the record is devoid of any evidence and only contains the factual allegations contained in the Complaint), the fact that coverage under the DBA has not been established should alone be a

sufficient ground to reject Blackwater's Petition. Nonetheless, Respondent will address each of Blackwater's arguments in its Petition, despite the fact that they all fail from a fundamental standpoint, since they are premised on the assumption of coverage under the DBA, which is a determination that has undisputably not been made. [Pet. App. 20a-21a]

II. Fourth Circuit's Application of 28 U.S.C. § 1447(d) Was Proper.

A. A Remand Order Based on Lack of Subject Matter Jurisdiction is not Reviewable.

Since 1887, Congress has forbidden appellate review of orders remanding a case to state court. The modern version of this statute is embodied in 28 U.S.C. § 1447(d), which provides, in relevant part: *"**An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise** . . . ."* 28 U.S.C. § 1447(d).

The seminal case concerning the interpretation of Section 1447(d) is the Supreme Court's decision in *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, the Court analyzed the extent of the appellate bar of Section 1447(d). It found that if a district court remands a case to state court for any of the grounds set forth in 28 U.S.C. § 1447(c), the remand order is *not* reviewable "by appeal, mandamus, or otherwise." *Thermtron*, 423 U.S. at 343.

The Court also found that a remand order based on lack of jurisdiction is immune from appellate review, *even if erroneously decided*:

> It is unquestioned in this case and conceded by Petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887. *Id.*

The import of *Thermtron* is that all remand orders based on the grounds set forth in Section 1447(c) are immune from appellate review. *See Id.* at 346. Following the decision in *Thermtron*, the Supreme Court elaborated on the concept that, regardless of whether the remand order was wrongly decided, it is still not reviewable on appeal:

> [W]hile the District Court may have been wrong in its analysis, it clearly stated, citing to §1447(c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with §1447(c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of *28 U.S.C. § 1447*(d). *Volvo of America v. Schwarzer*, 429 U.S. 1331, 1332 (1976).

Over the years the Supreme Court consistently applied the bar articulated by Congress in Section 1447(d). In *Things Remembered v. Petrarca*, 516 U.S. 124 (1995), the Court recognized,

> Congress has placed broad restrictions on the power of federal appellate courts to review District Court orders remanding removed cases to state court. * * * As long as a District Court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a Court of Appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d). *Id.* at 127-28: *See also Briscoe v. Bell*, 432 U.S. 404 (1977); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); and *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996).

The Supreme Court has articulated the intent of Congress in prohibiting appellate review of a remand order: "Congress' purpose in enacting § 1447(d) was to 'prevent delay in the trial of remanded cases by protracted litigation of jurisdictional

issues.'" *Sheet Metal Workers' International Association v. Carter*, 450 U.S. 949, 952 (1981).

The instant case falls squarely within the express language of 28 U.S.C. §1447(d), as well as the long line of Supreme Court decisions. The District Court issued an order remanding the case back to state court upon a finding that it lacked subject matter jurisdiction over the action. The language of the remand order leaves no doubt that the case was remanded based on the lack of jurisdiction ground articulated in Section 1447(c):

> Consequently, this court lacks subject matter jurisdiction to consider plaintiff's claim, however much they involve coverage issues under the DBA. [App: 47a]
>
> In summary, under the circumstances of this case, this court lacks subject matter jurisdiction over this cause of action, whether asserted on the basis of complete preemption or "unique federal interests." [App: 54a]
>
> Having found no basis for subject matter jurisdiction the court turns to the remaining question of the ultimate disposition of this case. [App: 54a]
>
> Accordingly, where the court finds no basis for subject matter jurisdiction, § 1447(c) compels the court to remand this action to state court. [App: 54a-55a]
>
> Based upon the foregoing, the court GRANTS plaintiff's motion to remand, pursuant to 28 U.S.C. § 1447(c). [App: 56a]

Since the remand order was based on one of the grounds enumerated in Section 1447(c), appellate review of that order, by way of appeal, mandamus or otherwise, is strictly prohibited by Section 1447(d). The Fourth Circuit properly analyzed and applied Section 1447(d), and dismissed Blackwater's appeal for lack of appellate jurisdiction.

B. Blackwater's Reliance on this Court's Pending Review of *Osborn v. Haley* is Not Compelling.

In its Petition, Blackwater relies on the fact that this Court is now reviewing the case of *Osborn v. Haley*, No. 05-593. There,

upon granting the petition for certiorari, the Court stated: "In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding *28 U.S.C. § 1447(d)*." *Osborn v. Haley*, 127 S.Ct. 2017 (2006). Blackwater suggests that the Court may be considering additional exceptions to the appellate bar of Section 1447(d)—a bandwagon Blackwater hopes to jump on.

However, the Respondent interprets the *Osborn* order granting certiorari much differently. In the underlying decision, *Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2006), the Sixth Circuit reviewed the jurisdictional effect of the Attorney General's certification that a federal employee's conduct was in the course and scope of employment under the Westfall Act, where the court subsequently found that the employee's conduct falls outside the scope of employment, as a matter of law. The issue of whether the remand order was reviewable in light of Section 1447(d) was *never* addressed by the Sixth Circuit.

Thus, the request by this Court for the parties to brief the issue of the applicability of Section 1447(d) suggests to the Respondent that the Court is concerned that the Sixth Circuit may have put the cart before the horse by deciding the merits of the case without first satisfying itself that it had appellate jurisdiction over the matter in light of Section 1447(d). If this interpretation of the Court's request for briefing is correct, it cuts against Blackwater's position and supports the Respondent's contention that the Fourth Circuit did not err in finding it lacked appellate jurisdiction to review the remand order based on a finding of lack of subject matter jurisdiction. Therefore, although the fact that this Court is reviewing *Osborn v. Haley* is Blackwater's lead argument against the application of Section 1447(d), it is not compelling.

C. Congress Expressly Intended to Prohibit Appellate Review of Remand Orders.

The focus of Blackwater's argument that Section 1447(d) should not bar appellate review of the remand order in this case is that "Nothing in the text or legislative history of Section 1447(d) suggests that Congress intended to preclude appellate review of a remand order that relegates to a state court the resolutions of respondents' constitutionally-suspect tort claims." [Pet. 20] Essentially, Blackwater argues that since Congress did not *specifically* say that Section 1447(d) bars appellate review of the remand of a case where the defendant asserts a federal defense under the DBA, it should not apply here.

It is true that Congress did not laboriously list every possible case (and potential defenses) to which Section 1447(d) might apply (which would be nearly impossible). Instead, it crafted a blanket prohibition against appellate review in *every* case that is remanded for want of subject matter jurisdiction. Therefore, the fact that Congress did not mention in the statute or its legislative history that the appellate bar applies to cases where the defendant is asserting a defense under the DBA is not persuasive. Instead, the general rule of Section 1447(d) applies to *all* cases that are remanded for lack of subject matter jurisdiction (irrespective of the individual defenses to the merits the defendant may be alleging). The only exception thereto is the severable order exception articulated by this Court in *City of Waco v. U.S. Fidelity and Guarantee Co.*, 293 U.S. 140 (1934).

D. The Severable Order Exception to Section 1447(d) Does Not Apply in this Case.

At the Fourth Circuit, Blackwater argued that the "severable order" exception to Section 1447(d), set forth by this Court in *City of Waco* and applied by the Fourth Circuit in *Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000), applies in taking the subject remand order out from under the appellate bar of Section 1447(d). While this argument does not seem to appear in

Blackwater's instant Petition, the Fourth Circuit correctly found that the District Court's remand order does not involve a severable order which would bring it within the exception under *City of Waco*. [Pet. App. 19a-21a] In determining that it lacked jurisdiction and therefore must remand the case, the District Court did not make any orders that affected the substantive rights of Blackwater. Even the District Court's finding that the DBA does not provide for complete preemption for removal purposes is "inseverable from its determination that it lacked jurisdiction." *Nutter v. Monongahela Power Company*, 4 F.3d 319, 321 (4th Cir. 1993).

The District Court's remand order was based on a finding of lack of subject matter jurisdiction and does not fall within the *City of Waco* severable order exception. Therefore, based on the express language of Section 1447(d) and a century of American jurisprudence, the remand order is not reviewable "by appeal, mandamus, or otherwise." *Thermtron*, 423 U.S. at 343. Thus, the Fourth Circuit did not err in dismissing the appeal for lack of appellate jurisdiction.

E. There is No Justification for Creating a New Exception to Section 1447(d).

In that the Fourth Circuit's decision is entrenched in long-standing, well-settled legal precedent, Blackwater asks this Court to create a *new* exception to Section 1447(d)—which the Fourth Circuit refused to do.[2] More specifically, Blackwater requests that this Court create a "constitutional-questions exception" to Section 1447(d). [Pet. 23]

Even if this Court was so inclined to nibble away at Congress's prohibition against appellate review of remand orders, there is a fundamental reason why this is not the case to do it. Blackwater cites decisions from eight different Circuits for its contention that "a statutory bar to review does not preclude a federal court from addressing a constitutional claim, absent

2. "For these reasons, we decline to graft a new exception onto the already significantly burdened text of § 1447(d)." [Pet. App. 27a]

clear statement of Congressional intent." [Pet. 23] As a preliminary matter, it must be noted that none of the eight Circuit cases cited by Blackwater analyze or even mention Section 1447(d)—except for one which applied the severable order exception, but did not suggest that a new constitutional question exception be created.[3]

More fundamentally, each of the eight Circuit cases cited by Blackwater concern the reviewability of a constitutional "claim." The problem with applying the logic of those cases to the instant one is that this case does not involve a constitutional "claim." Instead, it involves an anticipated federal "defense" under the DBA. Courts have historically not given the same level of federal protection to anticipated "defenses," as compared to federal or constitutional "claims." The most predominant example of this is the century-old body of law prohibiting an anticipated federal defense, even one of federal preemption, from serving as the basis of federal jurisdiction. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 43 U.S. 1, 7 (1983); *Taylor v. Anderson*, 234 U.S. 74, 75 (1914); *Gully v. First National Bank*, 299 U.S. 109, 113 (1936); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987); *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 472 (1998); and *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003).

The problem with basing federal jurisdiction, or in this instance a new exception to Section 1447(d), on an anticipated federal defense is that the defense may simply not pan out in the end. If federal removal jurisdiction could be based on the mere assertion of a federal defense, and the defendant could not eventually prove the defense, the entire basis for the federal jurisdiction would crumble. "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 376 (1994). As such, jurisdiction is

3. *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993).

only "authorized by the Constitution and statute, which is not to be expanded by judicial decree," nor the defensive allegations of a defendant. *Id.*

The same principle holds true with respect to Blackwater's request that this Court create a new exception to Section 1447(d) based on its anticipated defense under the DBA. If the Court *did* create a new "constitutional question" exception to Section 1447(d), Blackwater might be able to have the Fourth Circuit review the propriety of the District Court's remand order. Assuming *arguendo* that the Fourth Circuit reversed the District Court's remand and instructed the case be litigated in federal court, if Blackwater ultimately failed in its defense under the DBA, procedural chaos would immediately ensue. At that point in time, the Fourth Circuit would have reviewed an order that should have been barred from review, and the District Court would have litigated a case over which it never had jurisdiction—all because the appellate review and federal jurisdiction was premised on an anticipated defense which ultimately failed.

It is this procedural nightmare that the Court has sought to avoid for the past century by finding that federal jurisdiction cannot be premised upon an anticipated defense.[4] For these reasons, the Court should not now deviate from this principle by creating a "constitutional question" exception to Section 1447(d) based on Blackwater's anticipated "defense" of the exclusive remedy provision of the DBA.

The corollary to not permitting an anticipated federal defense to create federal jurisdiction is the principle that state courts are competent to decide federal defenses. Blackwater takes the "sky is falling" approach in contending that a state court should not determine coverage under the DBA. In fact, Blackwater will have this Court believe that if this case is permitted to proceed as it currently stands, the North Carolina state court would actually be controlling the war in Iraq by

4. The only exception is the complete preemption doctrine, which the District Court found does not apply to the DBA. [Pet. App. 50a]

"regulat[ing] the manner in which the United States armed forces supply lines are kept open under enemy fire in a foreign theater of war." [Pet. 7-8]

Why Blackwater strenuously argues that state courts are so incompetent to decide the issue of coverage under the DBA is unclear. However, this Court has already rejected the notion that state courts are unable to apply federal law. *See Amalgamated Clothing Workers of America v. Richmond Brothers Co.*, 348 U.S. 511, 518 (1955). "[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). Moreover, Circuit courts have continually held that, absent "complete preemption," the affirmative defense of ordinary federal preemption is properly determined by the state courts: "State courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Railway Labor Executives Assoc. v. Pittsburgh & L.E.R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *See also Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1357 (11th Cir. 2003); and *Roddy v. Grand Truck Western Railroad, Inc.*, 395 F.3d 318 (6th Cir. 2005).

"[T]he fact that a federal statute creates a defense to a state law claim does not necessarily mean that Congress has, by statute, taken the subject away from state tribunals and given it to federal courts." *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001); *See also Romney v. Lin*, 105 F.3d 806, 813 (2d Cir. 1997) ("There are thus some cases in which a state law cause of action is preempted, but only a state court has jurisdiction to so rule."). "If the federal court rules that the claim is not 'completely preempted' then the federal court has no jurisdiction to rule on a substantive defense and remand is required. The substantive defense of preemption is then a matter for the state court to determine as part of the trial proceedings." *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989).

In addition to Blackwater's anticipated federal defense not providing justification for the creation of a new "constitutional question" exception to Section 1447(d), Blackwater's policy arguments are equally unconvincing. Blackwater asks this Court to abandon the long-standing basic principles of federal jurisdiction to create a new exception to contour to the current President's Administration's "Total Force" policy. While Respondent disputes that Blackwater was a federal contractor or a part of this new concept of "Total Force," American jurisprudence and the fundamental principles of federal jurisdiction should not blow with the wind and change dependent upon how the country decides to fight one war from another.

Blackwater further argues that the effect of the District Court's remand is that a state court in North Carolina will handcuff the President's ability to wage war and change the nation's foreign policy. This is simply an overstatement of the case. Blackwater has wrapped itself in the American flag and declared it part of United States military, in an effort to acquire governmental immunities and escape liability for its wrongful conduct which caused the deaths of four Americans. However, this case is not about interfering with the U.S. Armed Forces operations in Iraq, but instead is about holding a private North Carolina company accountable for its wrongful conduct.

Moreover, this case is not one that involves a political question, as evidenced by the fact that the political question doctrine was never argued at the District Court or Fourth Circuit, but instead only surfaced in Blackwater's Petition, in an effort to achieve Supreme Court review. The North Carolina state court *is* the proper forum to adjudicate the two state law claims for wrongful death and fraud against a private North Carolina company (Blackwater).

In all, there is no justification, in law or policy, to create a new exception to the "already significantly burdened text of Section § 1447(d)"[5] in favor of Blackwater's anticipated defense under the DBA. There being no new exception to the appellate

5. Pet. App. 27a.

bar of Section 1447(d), the Fourth Circuit correctly determined that it was without appellate jurisdiction to review the District Court's remand order based on lack of subject matter jurisdiction. The Fourth Circuit having committed no error, there is no compelling reason to grant the instant Petition.

III. There Is No Relevant Unsettled Question Concerning the *Abolished* Derivative Jurisdiction Doctrine.

Since the District Court found that it was without subject matter jurisdiction, it followed the mandatory language of Section 1447(c) by remanding the case back to state court. *See* 28 U.S.C. § 1447(c). Blackwater now argues that the derivative jurisdiction doctrine should apply to this case, which would arguably require the District Court to dismiss, instead of remanding. Blackwater's argument on the issue of the derivative jurisdiction doctrine rests on two 94 year-old cases, which do not take into account the last century of American jurisprudence, nor the 1986 Congressional amendment which specifically abolished the derivative jurisdiction doctrine. [Pet. 9-10][6]

A. The Derivative Jurisdiction Doctrine was Abolished by Congress and Every Circuit Recognizes the Abolition.

With respect to the derivative jurisdiction doctrine, Blackwater claims that the federal courts are in "disarray" concerning its application. However, the derivative jurisdiction doctrine was expressly abolished by Congress when it added Subsection (e) to 28 U.S.C. § 1441 in 1986.[7] *See* Judicial Improvements Act of 1985, Pub L. No. 99-336, § 3, 100 Stat. 633 (1986); 28 U.S.C. § 1441(e). In a footnote, Blackwater states: "Some courts have mistakenly stated that §1441(f) 'abolishes the derivative jurisdiction doctrine[.]'" [Pet. 12, fn2]

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6. Relying on *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377 (1922), and *General Investment Co. v. Lake Shore & Michigan So. Railway Co.*, 260 U.S. 261 (1922).

7. Subsection (e) was later re-labeled as Subsection (f) by Congress in 2002.

Thereby, Blackwater suggests that there may be a couple of rogue courts throughout the country who "mistakenly" found that Congress's amendment to Section 1441 abolished the derivative jurisdiction doctrine, and thus the issue should be settled by this Court accepting review of this case. This characterization is misleading.

Not only has Congress expressly abolished the derivative jurisdiction doctrine through its amendment to Section 1441, but *every single* Circuit throughout the country has recognized that the derivative jurisdiction doctrine has been abolished, and there is no "disarray" of the Circuits for this Court to resolve. *See Lloyd v. FDIC*, 22 F.3d 335 (1st Cir. 1994); *Nordlicht v. New York Telephone Co.*, 799 F.2d 859 (2nd Cir. 1986); *Bradshaw v. General Motors Corp.*, 805 F.2d 110 (3rd Cir. 1986); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225 (4th Cir. 1993); *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126 (5th Cir. 1988); *Carpenter v. Dalrymple*, 894 F.2d 407 (6th Cir. 1990); *United States v. Brandt Construction Co.*, 826 F.2d 643 (7th Cir. 1987); *North Dakota v. Fredericks*, 940 F.2d 333 (8th Cir. 1991); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *State of Oklahoma v. Jan Graham and Chickasaw Nation*, 846 F.2d 1258 (10th Cir. 1988); and *Hollis v. Florida State Univ.*, 259 F.3d 1295 (11th Cir. 2001).

Although Blackwater asserts as its first and primary argument supporting its Petition that there is a split in the Circuits concerning the application of the derivative jurisdiction doctrine, Congress expressly abolished it and every Circuit court has recognized the abolition. This alone constitutes grounds for denial of the Petition. However, to the extent that this Court considers Blackwater's requested revival of the abolished derivative jurisdiction doctrine, its argument is inherently flawed.

Blackwater suggests that this Court should hear the instant case to determine "whether the Derivative-Jurisdiction Doctrine continues to apply where *both* the federal court and the state court lack jurisdiction over a removed case." [Pet. 13.] However,

there is nothing in the record to suggest that the state court lacks jurisdiction over this case. The Complaint consists of two North Carolina state law claims for wrongful death and fraud. These are claims over which the state court clearly has jurisdiction. Nonetheless, Blackwater's argument is premised upon its assertion that the DBA applies and thus provides the exclusive remedy to the survivors of the Decedents (which remedy lies in the Department of Labor and not in the state court).

However, as stated by both the District Court and the Fourth Circuit, the issue of coverage under the DBA has not been decided in this case. [Pet. App. 20a-21a] Moreover, the facts contained in the record before the Court reveal that the Defense Base Act does *not* cover the subject deaths.

B. The Defense Base Act Does Not Apply.

The DBA is comprised of a detailed statutory scheme by which compensation may be paid to certain "employees," engaged in very particularized scopes of work, for injury or death resulting from negligent conduct. An analysis of these three key elements that trigger coverage under the DBA shows that the defense will be unsuccessful.

First, the DBA specifically only applies to "employees." The DBA provides that "the provisions of the Longshoremen's and Harbor Workers' Compensation Act . . . shall apply in respect to the injury or death of any *employee* engaged in any employment" in six specific categories of work. [Emphasis] 42 U.S.C. § 1651(a). Here, the only facts in the record are those contained in the Complaint. The Complaint specifically states that the four Decedents were not employees, but instead were independent contractors: "Helvenston, Teague, Zovko and Batalona, and each of them, were hired by BLACKWATER as independent contractors, and were at no relevant time employees of BLACKWATER." [Compl: ¶31]. Moreover, the Complaint alleges and the record reflects that these four men signed "Independent Contractor Service Agreements." [Pet. App. 35a] These agreements expressly state: "Contractor acknowledges

that it is solely an independent contractor."[8] Therefore, Blackwater's defense under the DBA will fail because the Decedents were independent contractors, not employees which might otherwise be covered under the DBA.

Second, the DBA only applies to individuals working within a limited scope of six different categories of employment. *See* 42 U.S.C. § 1651(a)(1)-(6). Blackwater claims that 42 U.S.C. § 1651(a)(4) applies because it was a subcontractor to the United States government through a series of contracts running from Blackwater to Regency to ESS to Kellogg Brown and Root ("KBR") to the U.S. government.[9] However, Blackwater has never been able to prove this contractual chain.

Moreover, within the last few months, the United States Army, at the direction of former Secretary of Defense Donald Rumsfeld, has stated that KBR has never directly hired a private security contractor, including Blackwater, in support of the Army's Logistics Civil Augmentation Program ("LOGCAP"). [Resp App. 1a] Moreover, Haliburton, the parent company to KBR, has also disclaimed a contractual relationship between Blackwater and the U.S. government, when it stated on December 7, 2006, that "all information available to KBR confirms that Blackwater's work for ESS was not in support of KBR and not under a KBR contract." [Resp. App. 4a] In addition, Haliburton stated that Blackwater services were "not directly billed to any government contract." [Resp. App. 4a] Therefore, Blackwater will be unable to prove that the Decedents were working within any of the six limited scopes of employment to which the DBA applies. Thus, coverage under the DBA is doubtful.

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8. The agreements also state: "Nothing contained in this Agreement shall be deemed to constitute either BSC [Blackwater], the Contractor or Customer as an agent, representative, partner, or joint venturer or employee of the other party for any purpose." [4th Cir. Appellants' App.: ¶ 20.15, pgs. 387, 402, 420, 438]

9. *See* Blackwater's Notice of Removal: 4th Cir. Appellants' App.: 38, ¶5-6]

Third, as with most worker's compensation statutes, the DBA applies to injury or death resulting from negligent or reckless conduct—not intentional conduct. *See Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. Tx. 2005)[10] This issue caught the attention of the Fourth Circuit, who asked during oral argument whether the DBA would provide the exclusive remedy for an employer who intentionally shot and killed one of its employees. Despite Blackwater's statement that it *would*, the case law developed in the proceedings below indicates that the exclusivity provision provided by the DBA does not apply to intentional conduct. Here, the only two causes of action involved are the intentional torts of wrongful death and fraud. Therefore, such intentional conduct falls outside the purview of the worker's compensation law under the DBA.

It is unlikely that the DBA will apply in this case. However, in any event, the record is clearly not developed to the point where the Court could *assume* coverage under the DBA (especially in light of both lower courts stating that no such determination has been made). If no assumption of coverage under the DBA can be made, then there is no reason to assume that the state court lacks jurisdiction over the case. If the state court does not lack jurisdiction over the case, there is no reason to consider the resurrection of the derivative jurisdiction doctrine, and the District Court did not err in remanding the case instead of dismissing it.

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10. In *Fisher*, the court denied a motion to dismiss based on the DBA, finding it does not apply to intentional torts: "A very narrow exception to the DBA's exclusive liability provision applies where the employer acted with specific intent to injure the employee. . . . On a Motion to Dismiss, the Court must accept Plaintiffs' allegations as true. Plaintiffs have alleged facts that fall within the exception to the exclusivity provision of the DBA for intended harm. Accordingly, Defendants' motion to dismiss based on the DBA must be denied." *Id.* at *9.

C. Upon a Finding of Lack of Jurisdiction, the District Court Must Remand.

"If at any time before judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The mandatory language of Section 1447(c) has been interpreted to mean that once the District Court determines it is without jurisdiction, it must do nothing other than remand. "The plain language of § 1447(c) gives 'no discretion to dismiss rather than remand an action' removed from state court over which the court lacks subject-matter jurisdiction." *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996), citing *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 89 (1991). Here, the District Court had no discretion to dismiss, in that Section 1447(c) mandates only remand upon a finding of lack of subject matter jurisdiction.

D. The Futility Exception to Section 1447(c) Does not Apply.

Similar to the unsuccessful defendant in *International Primate*, Blackwater argues that, notwithstanding the clear requirements of Section 1447(c), the District Court should have dismissed the case instead of remanding it, pursuant to a "futility" exception. In support thereof, Blackwater relies on the *only* federal decision which has recognized and applied a futility exception: the Ninth Circuit's decision in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991).

In *Bell*, the court recognized the requirement of Section 1447(c) that upon a finding of lack of subject matter jurisdiction "the case shall be remanded." *Id.* at 1424. However, the Ninth Circuit then determined that there should be a "futility" exception to that rule, claiming that "[w]e do not believe Congress intended to ignore the interest of efficient use of judicial resources." *Id.* at 1425-26. In its concern of not running afoul of any comity issues, the Ninth Circuit analyzed the

decision in *M.A.I.N. v. Commissioner Main Dept. Of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989).

In *M.A.I.N.*, the defendants similarly argued that despite the District Court finding a lack of subject matter jurisdiction, it should have dismissed the case instead of remanding it to state court. The First Circuit was careful to not carelessly apply a "futility" exception to the general rule that, unless there is an "absolute certainty" that remanding the case would be futile, courts should not digress from the mandate prescribed by Congress in 28 U.S.C. § 1447(c):

> We think, however, that the District Court erred in departing from the literal words of § 1447(c), which, on their face, give it no discretion to dismiss rather than remand an action. And, we are unwilling to read such discretion into the statute, here, because we cannot say with absolute certainty that remand would prove futile. It is conceivable, though unlikely, that M.A.I.N. will succeed in finding a state forum for its claims. *Id.* at 1054.

The First Circuit completed its analysis with the caveat: "But the fact that we believe a certain legal result *unlikely*, as a matter of state law, it is not sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded.'" *Id.* at 1055.

In light of these cautionary words by the First Circuit, the Ninth Circuit in *Bell* analyzed the issue and determined that it was "absolutely certain" that the remand there would be futile. As such, it applied the futility exception and dismissed the case instead of remanding it, despite its finding of lack of removal jurisdiction. *Bell*, 922 F.2d at 1425.

However, nothing even close to an "absolute certainty" exists in the instant case. Here, Blackwater contends that the District Court should have dismissed the case after finding a lack of subject matter jurisdiction, instead of remanding it, because the state court is without jurisdiction due to its defense under the DBA. However, this argument that the DBA applies

and thus there exists no state jurisdiction because of its exclusivity provisions is just that—Blackwater's "argument." There has been no legal determination of coverage under the DBA, as expressly noted by both of the courts below. [Pet. App. 20a-21a]

In all, there is a substantial likelihood that Blackwater will *not* prevail on its federal defense under the DBA, in that the Decedents were independent contractors (not employees), were not working within any of the six limited scopes of employment to which the DBA applies, and were killed as the result of intentional conduct. In any event, there is clearly not an "absolute certainty" that Blackwater's defense under the DBA will prevail. Thus, there can be no finding that the state court lacks jurisdiction and remand would be futile. To the extent that there exists a viable "futility" exception to the express prescription by Congress that upon a finding of lack of subject matter jurisdiction the case "shall" be remanded, said futility exception does not apply in this case because there is no "absolute certainty" that the DBA will apply and the state court will lack jurisdiction.

E. The Claim of Differential Treatment of the Abolished Derivative Jurisdiction Doctrine is a Red Herring.

In another effort to create an issue which might fall within the category of cases this Court accepts to review, Blackwater contends that the derivative jurisdiction doctrine (now abolished) has been given different application to cases removed under 28 U.S.C. § 1441 than those removed under 28 U.S.C. § 1442. This is an irrelevant issue in the case. First, the derivative jurisdiction doctrine was abolished by Congress in 1986. *See* 28 U.S.C. § 1441(f).

Second, Blackwater did not remove the case to federal court under Section 1442, nor argue removal under this section at the District Court. [Pet. App. 23a, fn8] Instead, removal was based exclusively on Section 1441. Although Blackwater attempts to skirt this important fact by stating, "this is neither here nor

there,"[11] the legal basis for removal is absolutely critical to the jurisdictional analysis. It was not until the appeal at the Fourth Circuit that Blackwater abandoned its efforts to justify removal jurisdiction under Section 1441 on the basis of complete preemption under the DBA, and ran a new theory up the flag pole which consisted of an argument that, although the case was not removed under Section 1442, there should exist removal jurisdiction because Blackwater was acting at the direction of a federal officer or agency.

While the record below contains a thorough analysis as to why Blackwater is not entitled to removal under Section 1442,[12] the issue was properly not considered by the Fourth Circuit, since the case was not removed under Section 1442, nor argued as such at the District Court. [App.23a, fn8] Therefore, Blackwater's current attempt to achieve Supreme Court review by arguing that this Court should resolve the "differential treatment" of the abolished derivative jurisdiction doctrine between removals under Section 1441 and Section 1442—where Blackwater failed to remove under the latter statute—is an irrelevant issue and one which does not necessitate this Court's review in this case.

In all, Blackwater's various attempts to achieve review of this case based on the abolished derivative jurisdiction doctrine fail and certainly do not provide a compelling reason to grant the Petition.

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11. Pet. 17.

12. Appellees' 4th Circuit Answer Brief; pgs. 34-42.

CONCLUSION

Based on the foregoing, as well as the well-reasoned decisions by the Fourth Circuit and the District Court, the Respondent respectfully requests that the Court deny Blackwater's Petition.

Respectfully submitted,

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APPENDIX

RESPONDENTS APPENDIX

SECRETARY OF THE ARMY
WASHINGTON

JUL 14 2006

The Honorable Christopher Shays
Chairman
Subcommittee on National Security, Emerging
Threats and International Relations
Committee on Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter to the Secretary of Defense requesting information from then Brigadier, now Major General Jerome Johnson, Commander U.S. Army Field Support Command, regarding the cost of third-tier subcontractors for security contracts under the Army's Logistics Civil Augmentation Program (LOGCAP). Secretary Rumsfeld has asked me to respond on his behalf.

Based on information provided to the Army by Kellogg, Brown and Root (KBR), KBR has never directly hired a private security contractor in support of the execution of a statement of work under any LOGCAP III Task Order. Additionally, KBR has queried ESS and they are unaware of any services under the LOGCAP contract that were provided by Blackwater USA. KBR is continuing to look into whether any private security firm may have been hired by ESS or any other subcontractor (including Regency Hotel) in support of LOGCAP III.

Appendix

Under the provisions of the LOGCAP contract, the U.S. military provides all armed force protection for KBR unless otherwise directed. Additionally, the LOGCAP contract states that KBR personnel cannot carry weapons without the explicit approval of the theater commander. To date, KBR has not pursued any requests under the LOGCAP contract for personnel to carry weapons nor has the theater commander directed or authorized KBR or any LOGCAP subcontractor to carry weapons. KBR has stated they have no knowledge of any subcontractor utilizing private armed security under the LOGCAP contract.

In regards to your request for reports analyzing the cost of paying contractors for security services or logistical support, we are unaware of any Department of Defense reports in these areas. The Congressional Budget Office (CBO) has produced a report titled "Logistics Support for Deployed Military Forces," dated October 2005 which compares the cost of paying contractors to provide security services or logistical support under the LOGCAP contract with the cost to the Army of providing the services or support itself. A copy of that report is enclosed.

With respect to withholding payments, the Office of the Secretary of Defense approved a deviation to Federal Acquisition Regulation clause 52.216.26, "Payments of Allowable Costs Before Definitization," on February 2, 2005, for task orders issued under the LOGCAP contract (DAAA09-02-D-0007). The deviation authorizes the Department of the Army to reimburse and make payment to the LOGCAP prime contractor on undefinitized task orders at rates up to 100 percent of allowable costs until June 30, 2005 or until the contract actions are definitized, whichever occurs first. The deviation has been extended to June 30, 2007. Given the volatility in requirements under contingency contracting, it is foreseeable there may be additional undefinitized task orders under LOGCAP. However,

since March 2005, the use of Undefinitized Contract Actions has been minimized to the maximum extent possible and all such actions issued under the LOGCAP contract have been definitized within the 180 day regulatory requirement.

A process has been developed in conjunction with the Defense Contracts Audit Agency, Army pricing specialists, and the contracting officer to evaluate unsupported costs. KBR is required to provide supporting documentation to the satisfaction of the contracting officer prior to the cost being accepted. I have asked the Office of the Chief of Legislative Liaison (OCLL) to work directly with your staff to address any specific issues surrounding unsupported costs, or other issues needing additional clarification.

Finally, regarding the request for copies of KBR's subcontract with ESS and Regency Hotel, as well as any consent package for the KBR-ESS subcontract, this information has been requested from KBR, and will be forwarded to Committee staff upon receipt.

I trust this information will resolve the matter to your satisfaction. I am providing a courtesy copy of this letter to Representative Waxman.

Sincerely,

s/ Francis J. Harvey
Francis J. Harvey

Appendix

Haliburton Statement
12/07/2006

All information available to KBR confirms that Blackwater's work for ESS was not in support of KBR and not under a KBR subcontract.

Blackwater provided services for the Middle East Regional Office of KBR. This office is not associated with any government contract and not associated with LOGCAP III. These services were provided outside of the Green Zone and were not directly billed to any government contract.

Melissa Norcross
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No. 06–857

In the Supreme Court of the United States

BLACKWATER SECURITY CONSULTING LLC, *et al.*,
Petitioners

v.

RICHARD P. NORDAN,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT JUSTIN L. MCQUOWN IN SUPPORT OF PETITIONER

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JANUARY 10, 2006

ARGUMENT

Respondent, Justin L. McQuown,[1] supports the issuance of a writ of certiorari for the reasons stated in the Petition for Writ of Certiorari filed by Petitioners, Blackwater Security Consulting LLC and Blackwater Lodge and Training Center, Inc.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the Court grant the Petitioners' writ of certiorari.

Respectfully submitted,

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[1] Justin L. McQuown is a Respondent in this case under Sup. Ct. R. 12.6, which states that "all parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. . . All parties other than the petitioner are considered respondents. . . ."

5

No. 06-857

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In the Supreme Court of the United States

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Respondent.

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QUESTIONS PRESENTED

1. Whether a federal district court that lacks subject-matter jurisdiction over a removed action must dismiss rather than remand the action when the state court also lacks jurisdiction.

2. Whether a court of appeals has jurisdiction to review a district court's remand order notwithstanding 28 U.S.C. § 1447(d) when the remand order would circumvent federal statutory and federal constitutional designs to preclude state court jurisdiction.

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INTRODUCTION

Respondent does not dispute that the Fourth Circuit's decision allows him to litigate in a state court claims that challenge whether military contract personnel serving the United States military were properly armed and commanded on the streets of Fallujah. This exposure to an unpredictable, and uninsurable, state tort liability is precisely what Congress intended to foreclose in the Defense Base Act, 42 U.S.C. § 1651 *et seq.* ("DBA"), by providing for an exclusive liability scheme to be administered by the U.S. Department of Labor subject only to federal court review. Allowing the district court's remand order to stand confers on state courts the very jurisdiction that Congress took away. Such a remand not only is "futile," as some courts of appeals have held in dismissing cases where the state court lacks jurisdiction, but it also contravenes Congressional intent to ensure that military contractors overseas have no liability except DBA liability determined exclusively in a federal forum. This case implicates a sensitive military policy authorized by Congress and implemented by the Executive Branch. It thus presents a compelling vehicle for resolving a recurrent question of federal practice under the removal statutes, a question which has divided the courts of appeals and over which there is no bar to appellate review.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER A REMOVED ACTION SHOULD BE DISMISSED OR REMANDED WHEN BOTH THE FEDERAL AND STATE COURTS LACK JURISDICTION.

There is no dispute that the courts of appeals are divided over whether dismissal or remand of a removed case is

proper when both the federal and state courts lack subject-matter jurisdiction. Respondent instead argues that Congress abolished the derivative-jurisdiction doctrine when it enacted 28 U.S.C. § 1441(f). Opp. 20-22. But Section 1441(f) does not sweep as broadly as respondent suggests, and thus, not surprisingly, respondent cannot explain away the split in the circuits over the continuing vitality of the derivative-jurisdiction doctrine. This court should grant certiorari to resolve that split and clarify that a federal court must dismiss rather than remand a case when *both* the federal and state courts lack jurisdiction over the removed case, regardless of the basis of removal to federal court.

Section 1441(f) provides only that a state court's lack of jurisdiction does not divest the federal court of jurisdiction to hear a removed case. *See* 28 U.S.C. § 1441(f) (a federal court is "not precluded from hearing and determining any claim [in a removed case] because the State court ... did not have jurisdiction over that claim"). The derivative-jurisdiction doctrine had provided the opposite, requiring federal courts to dismiss a removed case for lack of jurisdiction when the state court lacked jurisdiction, even though the federal court would have had original subject-matter jurisdiction. *See Minnesota v. United States*, 305 U.S. 382, 389 (1939) ("For jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."). Section 1441(f) overturns this aspect of the derivative-jurisdiction doctrine, but it does not address a second aspect: whether a federal court must dismiss rather than remand a removed case when both the federal and state courts lack jurisdiction. That aspect of the derivative-jurisdiction doctrine is alive and well today, as illustrated by both the "futility" exception to 28 U.S.C. § 1447(c), *see, e.g.*,

Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991); *Barbara v. NYSE*, 99 F.3d 49, 56 n.4 (2d Cir. 1996), and federal courts' dismissal of cases removed under the federal officer removal statute, 28 U.S.C. § 1442, when the state court also lacks jurisdiction. *See Smith v. Cromer*, 159 F.3d 875, 879, 883 (4th Cir. 1998) (dismissing and citing the derivative jurisdiction doctrine); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (same).

Respondent offers no reason why this Court should leave lingering the disarray in the courts of appeals over whether dismissal is appropriate under the derivative-jurisdiction doctrine when remand would be "futile" because the state court also lacks jurisdiction. Instead, respondent argues the merits of whether the state court lacks jurisdiction over his claims, asserting repeatedly that there has been "no determination of DBA coverage." Opp. 22-27. This is irrelevant, however, to the propriety of certiorari in this case. In the first instance, there has been at least one final DBA coverage determination by the U.S. Department of Labor involving one of the four decedents in this matter; moreover, there are ongoing DBA proceedings involving two of the other three decedents, as well as a *de facto* final order in the form of a "Memorandum of Informal Conference" for the fourth decedent, each of whom is represented by respondent's counsel. It is indisputable that through these administrative proceedings full DBA benefits have been paid in all four cases, as explained more fully by Amicus American International Group, Inc. *See* Amicus Br. 9-12. This demonstrates that the Department of Labor has already determined the DBA coverage issues that respondent repeatedly suggests have yet to be made.[1] And the

[1] On behalf of decedent Zovko, who had no known DBA beneficiaries, the Department of Labor entered a final DBA compensation order for benefits paid by Blackwater's DBA insurer into a special DBA fund. Beneficiaries of the three other decedents applied for and have

correspondence attached to respondent's opposition brief does not speak to the scope of DBA coverage in this case.[2]

More importantly, the merits of the DBA coverage question have no impact on this Court's ability to consider whether the derivative-jurisdiction doctrine continues to require dismissal rather than remand when both federal and state courts lack subject-matter jurisdiction, as here where Congress has provided an exclusive administrative liability scheme. This Court is not being asked to determine whether the claims are covered by the DBA; rather, the question is whether, under the derivative-jurisdiction doctrine, the district court should have determined whether the DBA's exclusive liability provision strips state courts of jurisdiction over respondent's claims in the first place, thus precluding remand — a question the district court erroneously concluded it lacked jurisdiction to resolve, App. 56a. The Fourth Circuit in turn erroneously concluded that under Section 1447(d), it lacked appellate jurisdiction to review the district court's failure to make that determination. App. 25a.

---

continuously received DBA benefits at maximum rates since the enemy attack of March 31, 2004. Despite representations to the courts by counsel (who represents both the respondent here and the beneficiaries) that the DBA does not apply, counsel has said nothing in agency proceedings to prejudice the beneficiaries' continued receipt of DBA benefits. Agency proceedings as to decedents Batalona, Helvenston and Teague remain formally open only because respondent's counsel asserts the right to withhold consent to the entry of final compensation orders confirming the insurer's obligation to pay benefits.

[2] Respondent suggests that correspondence between the United States Army and the Chairman of a Congressional Subcommittee demonstrates that "coverage under the DBA is doubtful." Opp. 23. But that correspondence merely states that Blackwater did not perform particular government contract services directly for Kellogg Brown and Root ("KBR"). It says nothing about the DBA claims at issue in this case.

Respondent also attempts to dismiss as irrelevant the differential treatment of cases removed under Sections 1441 and 1442, arguing instead that petitioners did not remove this case under Section 1442. Opp. 27-28. But petitioners are not asking this Court to review whether removal was appropriate under Section 1442. Rather, the differential treatment of cases removed under these two provisions is a direct result of, and illustrates, the confusion in the lower courts concerning removal practice in cases in which both the state and federal courts lack jurisdiction. There is no principled basis for courts to dismiss cases removed under Section 1442 but remand those removed under Section 1441 where both the federal and state courts lack jurisdiction over the removed case. And this case exemplifies why it makes no sense to apply the derivative-jurisdiction doctrine under the one provision but not the other: had Blackwater cited both removal provisions, the Fourth Circuit's jurisprudence would have commanded the district court both to remand under Section 1441 (without considering state-court jurisdiction) and to dismiss under Section 1442 (because the state court lacked jurisdiction).

It is undisputed that the DBA strips both state courts and federal courts of jurisdiction to hear DBA claims in the first instance, regardless of under what federal statute a lawsuit implicating DBA claims is removed, because the DBA's "liability as exclusive" provision, 42 U.S.C. § 1651(c), is inextricably related to DBA claims processed by the Department of Labor in the first instance. This Court should clarify that the derivative-jurisdiction doctrine continues to require that federal district courts lacking jurisdiction over removed actions must dismiss rather than remand actions where, as in the DBA, Congress intended to divest the state courts of jurisdiction. A remand in such circumstances is "futile," *Bell*, 922 F.2d at 1425, and is contrary to Congressional intent that at least the "liability as exclusive"

aspect of such cases be resolved by a federal administrative agency in the first instance (followed by federal court review). Given the national significance of this case, the petition for certiorari presents a compelling opportunity to resolve this important and recurring question of federal practice under the removal statutes.

II. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S REMAND ORDER, NOTWITHSTANDING 28 U.S.C. § 1447(d).

Rather than defend the district court's decision to remand rather than dismiss this case, respondent contends that the Court cannot decide the first question presented because 28 U.S.C. § 1447(d) precludes appellate review of the district court's remand order. Respondent's argument flies in the face of this Court's recent decision in *Osborn v. Haley*, No. 05-593, 2007 WL 135830 (U.S. Jan. 22, 2007), which makes clear that Section 1447(d) poses no bar to appellate review where, as here, Congress has divested the state court of jurisdiction over the case. Likewise, this Court's recent grant of certiorari in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, 2007 WL 124795, at *1 (U.S. Jan. 19, 2007), is further evidence that respondent's dispute over appellate jurisdiction under Section 1447(d) should not preclude this Court from granting certiorari.

This Court's recent *Osborn* decision rejects respondent's claim that Section 1447(d) constitutes "a blanket prohibition against appellate review in *every* case that is remanded for want of subject matter jurisdiction." Opp. 14. In *Osborn*, the Court held that Section 1447(d) does *not* preclude appellate review of every district court order remanding a case for lack of subject-matter jurisdiction. While *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "held that § 1447(d) must be read together with

§ 1447(c)," *Osborn*, 2007 WL 135830, at *11, the Court rejected the contention that all remand orders issued under Section 1447(c) are immune from appellate review. Rather, Sections 1447(c) and (d) also "must be read together with the later enacted § 2679(d)(2)," which bars a district court from remanding a certified Westfall Act case back to state court. *Osborn*, 2007 WL 135830, at *11-12. This "forum-select[ion]" provision of the Westfall Act "renders the federal court exclusively competent and categorically precludes a remand to the state court." *Id.* at *11. Even though the district court had remanded for lack of subject-matter jurisdiction under Section 1447(c), *see id.* at *6-7, the Court held that the later-enacted Westfall Act prevailed over Section 1447(d), permitting appellate review of the district court's remand order.

Osborn resolves any question of appellate jurisdiction in this case. Section 1447(d) does not preclude appellate review of the district court's remand order because the later-enacted DBA displaces state-court jurisdiction over respondent's claims and thus precludes the district court from remanding the case. Congress has determined that military contractors overseas are to be liable only under the DBA — "exclusive[ly] and in place of all other liability," 42 U.S.C. § 1651(c) — not under a competing patchwork of state tort laws. And Congress has determined that questions of DBA coverage are to be decided exclusively by the Department of Labor in the first instance, followed by federal court review. *See id.* §§ 1651(c), 1653(a)-(b). The DBA selects a forum for resolution of DBA cases — the Department of Labor — that, under *Osborn*, "renders the federal [agency] exclusively competent and categorically precludes a remand to the state court." 2007 WL 135830, at *11. The Fourth Circuit's decision allowing the district court to remand this case and construing Section 1447(d) to preclude appellate review of the remand order erroneously

commits the federal question of DBA coverage to the state court when Congress intended that it be determined exclusively in a federal forum. Like the Westfall Act's "forum selection" clause, the DBA's forum selection clause controls over Section 1447(d).

Osborn cannot be distinguished on the ground that Congress expressly addressed the question of removal in the Westfall Act but did not in the DBA. There was no reason for Congress to address removal in the DBA *because Congress also divested the federal courts of original jurisdiction when it selected the Department of Labor as the initial forum for DBA claims*. While *Osborn* holds that appellate review of remand orders is proper where "Congress has ordered the intercourt shuttle to travel just one way," 2007 WL 135830, at *12, its reasoning applies with even greater force where Congress has ordered the shuttle to travel out of the courts and to an administrative agency.

There is thus no procedural hurdle to granting the petition for certiorari to review the Fourth Circuit's decision below. This Court recently granted certiorari in a case presenting an important question regarding a provision of the Foreign Sovereign Immunities Act of 1976. *See Powerex*, 2007 WL 124795, at *1. There, as here, the district court remanded the case to state court, and in opposing certiorari, the respondent argued that Section 1447(d) precludes appellate review of the district court's remand order. Even before this Court handed down its decision in *Osborn*, the Solicitor General argued that respondent's narrow construction of Section 1447(d) was incorrect and should not preclude this Court's review. The Court agreed, granting certiorari to review the question presented with respect to the Foreign Sovereign Immunities Act, as well as the question whether the court of appeals had jurisdiction notwithstanding Section 1447(d). *See Powerex*, 2007 WL 124795, at *1.

So too here. Section 1447(d) imposes no bar to this Court's review, and this case presents a compelling opportunity for this Court to clarify an important question of federal practice.

Indeed, the Ninth Circuit's decision in *Powerex*, *see California v. NRG Energy Inc.*, 391 F.3d 1011, 1023 (9th Cir. 2004), is in conflict with the Fourth Circuit's decision below. In *Powerex*, two federal agencies removed the case under Section 1442. *See NRG Energy*, 391 F.3d at 1021. The district court held that neither the state court nor the federal court had jurisdiction, and after noting the disarray in the circuits over the continued vitality of the derivative-jurisdiction doctrine in the aftermath of Section 1441(f)'s enactment, *see* App. to Pet. for Cert., *Powerex*, No. 05-85, at 43a (U.S. July 15, 2005), it remanded the claims against the federal agencies. The Ninth Circuit reversed, holding that it had appellate jurisdiction to review the remand order notwithstanding Section 1447(d), *see NRG Energy*, 391 F.3d at 1023, and that because both the district court and state court lacked jurisdiction over the claims against the agencies, the district court should have dismissed the case rather than remand it. *See id.* at 1027.

Although the Ninth Circuit's decision with respect to the federal agencies is not directly implicated in this Court's grant of certiorari in *Powerex*, the conflict between the Fourth Circuit's decision below and the Ninth Circuit's decision further underscores the recurring nature of the questions presented in this case.

Finally, Blackwater notes that respondent misleadingly contends that Blackwater did not raise the political question doctrine in the courts below. Opp. 19. *But see* Pet. App. 26a-27a (addressing Blackwater's argument "that § 1447(d) does not prohibit appellate review in this case because the district court's decision to remand undermines the

constitutional sequestration of foreign affairs and war powers within the political branches of the federal government, out of reach of both the federal and the state judiciaries"). In this regard, respondent does not even address this Court's precedent in *Johnson v. Robison*, 415 U.S. 361 (1974), cited by both Blackwater, Pet. 22, and by Amicus American International Group, Inc., Amicus Br. 8, in which this Court held that "a provision barring review of individual veterans benefit determinations did not bar a constitutional challenge to the statute itself. The Court distinguished 'those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans' from constitutional challenges to 'a decision of Congress.' This circuit, like others, has followed *Robison* and its progeny." *General Elec. Co. v. E.P.A.*, 360 F.3d 188, 192 (D.C. Cir. 2004) (citing *Johnson*, 415 U.S. at 367).[3]

This second of two circuit splits addressed in Blackwater's petition, Pet. 23-24, between the *Johnson v. Robison* line of cases on the one hand, and the Fourth Circuit below joined only by the Ninth Circuit, highlights the need for this Court both to invite the views of the Solicitor General and to grant certiorari.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted. In the alternative, this Court should invite the views of the Solicitor General.

---

[3] Respondent notes in a footnote that *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993), is the only one of the "eight Circuit cases cited by Blackwater [as the progeny of *Robison* that] analyze[s] or even mention[s] Section 1447(d)." Opp. 16 & n. 3. In this regard, Blackwater cited *Aliota*, 984 F.2d at 1357, for its recognition of "jurisdictional concerns associated with the inability to review a constitutional decision." Pet. at 24. In *Osborn*, the Court also cited *Aliota* as "inform[ing]" its disposition of the case. 2007 WL 135830, at *9.

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No. 06-857

In The Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,

Petitioners,

v.

RICHARD P. NORDAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN INTERNATIONAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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January 22, 2007

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, American International Group, Inc. (hereinafter "AIG") respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of the Petition for a Writ of Certiorari of Petitioners Blackwater Security Consulting, LLC, *et al.* (hereinafter "Blackwater"). All parties have consented to the filing of the annexed brief except Respondent Richard P. Nordan ("Nordan"), who has declined to consent.

AIG writes a significant portion of the Federal Workers' Compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq.* This coverage protects American and foreign workers employed by private companies contracted by the United States government for overseas work relating to America's war, defense and reconstruction efforts in Iraq and Afghanistan. AIG's interests are those of the DBA insurance industry in being enabled to provide mandated cover for workers performing in the interests of the United States through utilization of private contractors in the war effort.

The decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit decision"), *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (App. 1a-32a), which remands the determination of DBA coverage to a state court, is unprecedented and subversive of Congressional intent, and threatens the viability of the DBA underwriting industry's ability to provide cover and the ability of private contractors to provide workers to serve America's war, defense and reconstruction efforts. The uncertainty and conflict in DBA

administration and inconsistent state court rulings on the application and scope of DBA cover will wreak havoc on underwriters' ability to price DBA cover and anticipate costs and exposures. This uncertainty may lead to the reduction of DBA underwriters and a restriction of commitment to providing DBA cover. The resulting effects on the ability of the United States government to implement its policy through DBA contracts overseas are potentially great.

The uncertainty and conflict likely to develop as a consequence of the Fourth Circuit decision enabling, on remand, a state court determination of the DBA's jurisdiction may lead to a situation where United States foreign policy interests, inclusive of defense, intelligence and reconstruction, may not be capable of implementation through the use of private contractors. The lack of sufficient underwriting interests and capability, as well as increased costs attributable to uncertainty, may reduce the pool of contractors available for these American missions.

The number of employees, employers and contractors within DBA cover has increased tenfold in the last several years as the United States government and its instrumentalities have accelerated and expanded the utilization of private interests to further foreign policy objectives. Particularly as concerns military, security and intelligence objectives, it has become the stated policy of the United States to privatize a significant number of critical functions previously performed by government employees, including military personnel. Private commercial contractors under United States government contracts are now an essential element of this country's war fitting

capability and are included in operational plans and orders.

The Fourth Circuit's unprecedented decision to remand DBA cover issues to a state court subjects DBA employees, employers and contractors to the tort laws of every state. It thereby creates war risk liability exposure, an uninsurable risk. The overwhelming negative consequences of the decision are of greatest concern to AIG and the entire DBA underwriting and private contracting industries.

For the foregoing reasons, AIG respectfully requests that its motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

American International Group, Inc. ("AIG") writes a significant portion of the Federal Workers' Compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq*. This coverage protects American and foreign workers employed by private companies contracted by the United States government for overseas work relating to America's war, defense and reconstruction efforts in Iraq and Afghanistan. AIG's interests are those of the DBA insurance industry in being enabled to provide mandated cover for workers performing in the interests of the United States through utilization of private contractors in the war effort.

The decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit decision"), *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (App. 1a-32a), which remands the determination of DBA coverage to a state court, is unprecedented and subversive of Congressional intent, and threatens the viability of the DBA underwriting industry's ability to provide cover and the ability of private contractors to provide workers to serve America's war, defense and reconstruction efforts. The uncertainty and conflict in DBA administration and inconsistent state court rulings on the application and scope of DBA cover will wreak havoc on underwriters' ability to price DBA cover and anticipate costs and exposures. This uncertainty may lead to the

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

reduction of DBA underwriters and a restriction of commitment to providing DBA cover. The resulting effects on the ability of the United States government to implement its policy through DBA contracts overseas are potentially great.

The uncertainty and conflict likely to develop as a consequence of the Fourth Circuit decision enabling, on remand, a state court determination of the DBA's jurisdiction may lead to a situation where United States foreign policy interests, inclusive of defense, intelligence and reconstruction, may not be capable of implementation through the use of private contractors. The lack of sufficient underwriting interests and capability, as well as increased costs attributable to uncertainty, may reduce the pool of contractors available for these American missions.

The number of employees, employers and contractors within DBA cover has increased tenfold in the last several years as the United States government and its instrumentalities have accelerated and expanded the utilization of private interests to further foreign policy objectives. Particularly as concerns military, security and intelligence objectives, it has become the stated policy of the United States to privatize a significant number of critical functions previously performed by government employees, including military personnel. Private commercial contractors under United States government contracts are now an essential element of this country's war fitting capability and are included in operational plans and orders.

The Fourth Circuit's unprecedented decision to remand DBA cover issues to a state court subjects DBA

employees, employers and contractors to the tort laws of every state. It thereby creates war risk liability exposure, an uninsurable risk. The overwhelming negative consequences of the decision are of greatest concern to AIG and the entire DBA underwriting and private contracting industries.

STATEMENT OF THE CASE

For purposes of this brief *amicus curiae*, AIG adopts the detailed review and analysis set forth in the STATEMENT OF THE CASE section contained in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision to remand DBA coverage issues to the North Carolina state court and thereby to subject a private military contractor to state tort laws is without support and in direct contravention of Congress' clearly-expressed intent in the DBA. Its effect is to reject Congress' mandate directing the United States Department of Labor ("Department of Labor") to, in the first instance, resolve questions of DBA cover, subject to review by the federal courts. Contrary to the express exclusive remedy provisions of the DBA, the decision creates war risk liability, an uninsurable risk.

Federal and state decisions have confirmed subject matter jurisdiction of DBA issues to be a federal question, not subject to state law. Moreover, the Fourth Circuit itself, in the instant decision and in previous decisions,

has held DBA cover to be exclusively a federal question not for state courts to resolve. The inclusion of private military contractors in the stated United States policy on war fitting capability further compels that DBA cover issues are federal and constitutional and not within any state's subject matter jurisdiction.

The Department of Labor has for the last 65 years, without exception, administratively handled all injury and death claims arising under the DBA. It has ruled on and is in the process of ruling on the DBA claims of Jerko Zovko ("Zovko"), Stephen Helvenston ("Helvenston"), Wesley Batalona ("Batalona") and Michael Teague ("Teague"). It has ordered DBA cover on the Zovko claim and made various rulings in support of DBA cover on the others. The Department of Labor has issued DBA cover orders on numerous other DBA claims filed by Blackwater's employees and contractors working under its military contracts with the United States government. It is fulfilling its Congressional mandate of addressing DBA cover in the first instance, and the Fourth Circuit's decision should not be allowed to subvert its actions.

ARGUMENT

I. The Questions Presented Are Important, and This Controversy Is an Appropriate Vehicle in Which to Resolve Them.

The Fourth Circuit decision creates the dire circumstance of empowering a state court with determining DBA cover in full contravention of Congress' intent and the mandate of this Court. If left standing, it would be the first known instance of remanding a battlefield contractor

tort lawsuit to a state court – whether before or after the political branches of the national government formalized the concept wherein military contractors are considered an integral component of our deployed "Total Force," serving alongside "active and reserve military components . . . in thousands of locations around the world, performing a vast array of duties to accomplish critical missions." Secretary of Defense, *Developing a 21st Century Total Force*, Quadrennial Defense Review Report at 75 (Feb. 6, 2006) (http://www.comw.org/qdr/qdr2006.pdf). *See generally* David C. Hammond, *Holding Battlefield Contractors Accountable: Federal 'Removal' Protects Federal Interests*, 21 Legal Backgrounder 13 (Washington Legal Foundation) (Apr. 7, 2006) (http://www.wlf.org/upload/040706LBHammond.pdf).

In the past year, even while the Executive Branch formalized the "Total Force" concept, at least six federal courts have either denied motions to remand tort lawsuits against battlefield contractors or have dismissed such cases based on the nonjusticiability of the tort allegations against each respective battlefield contractor. *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 U.S. Dist. LEXIS 75574 (S.D. Tex. Oct. 11, 2006); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006); *Woodson v. Halliburton Corp.*, No. H-06-2107, 2006 U.S. Dist. LEXIS 70311 (S.D. Tex. Sept. 28, 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (relying heavily on *Grable & Sons Metal Prods., Inc. v. Da. ue Eng'g & Mfg.*, 545 U.S. 308 (2005)).

As explained below, the Petition for a Writ of Certiorari provides this Court an opportunity to resolve the

important issues presented for the sake of the United States, its DBA insurance providers, and its battlefield contractors who are required by federal law to maintain DBA insurance.

II. The Decision of the Fourth Circuit Improperly Grants to State Courts Subject Matter Jurisdiction to Decide Questions of DBA Coverage.

In the 65-year history of the DBA there has never been a federal judicial determination, such as the Fourth Circuit decision, suggesting that a state court has jurisdiction to determine the issue of DBA coverage. Never before has a federal court remanded to a state court the determination of DBA cover in the first instance. The consequences of allowing the Fourth Circuit decision to stand are far reaching to the private federal contractor and DBA underwriting industries. That decision rejects the comprehensive federal framework for the adjudication and administration of DBA claims, inclusive of the critical exclusive remedy provision of the DBA, subjecting a purely federal question to the tort laws of 50 states. The Fourth Circuit should have remanded the case to the district court with instructions to dismiss because, regardless of whether the district court had subject matter jurisdiction upon removal, and regardless of whether the Fourth Circuit had appellate jurisdiction under 28 U.S.C. § 1447(d) to review the district court's decision that it lacked subject matter jurisdiction, a federal court must dismiss rather than remand where, as here, the state court also lacks subject matter jurisdiction.

AIG agrees with the Petitioners that, whether it is called the doctrine of derivative jurisdiction or otherwise, the correct procedural course where a district court lacks

subject matter jurisdiction over a removed case, and the state court also lacks subject matter jurisdiction, is to dismiss rather than to remand the case. Here the state court lacks subject matter jurisdiction to decide whether the DBA applies and provides the exclusive remedy, *see* 42 U.S.C. § 1651(c), because Congress committed DBA coverage decisions to the Department of Labor subject only to judicial review by federal courts.

There is no support in federal or state law for remanding a DBA coverage determination to a state court. Numerous federal courts have confirmed the exclusivity of an employee's remedies under the DBA to be solely statutory DBA benefits. *Nauert v. Ace Prop. & Cas. Ins. Co.*, No. 04-CV-02547, 2005 U.S. Dist. LEXIS 34497 (D. Colo. Aug. 27, 2005) (dismissing plaintiff's state insurance law bad faith claim based on DBA preemption); *Ross v. DynCorp*, 362 F. Supp. 2d 344 (D.D.C. 2005) (granting defendants summary judgment on plaintiffs' wrongful death and survivorship claims); *Schmidt v. Northrop Grumman Sys., Corp.*, No. 3:04-CV-042, 2005 U.S. Dist. LEXIS 24688 (N.D. Ga. Mar. 4, 2005) (dismissing plaintiffs' wrongful death claims based on the exclusive remedy afforded by the DBA).

Several state supreme courts have similarly acknowledged that their lower state courts lacked subject matter jurisdiction over DBA matters. *Huhn v. Foley Bros., Inc.*, 22 N.W.2d 3 (Minn. 1946); *State ex rel. Haddock Eng'rs, Ltd. v. Swope*, 251 P.2d 266 (N.M. 1952).

The Fourth Circuit in its decision remanding the DBA cover issue to the North Carolina state court acknowledged that it is federal agencies and courts that have DBA subject matter jurisdiction. It succinctly stated that "federal district courts, followed by the federal courts of

appeals and the United States Supreme Court, review DBA claims after they have been initially adjudicated in the Department of Labor." *In re Blackwater*, 460 F.3d at 582 n.2, 591 n.9 (citing, *inter alia*, *Lee v. Boeing Co.*, 123 F.3d 801 (4th Cir. 1997)).

In fact, the Fourth Circuit had previously acknowledged the unique federal involvement in the determination and scope of DBA jurisdiction. In *Shives v. CSX Transportation, Inc.*, 151 F.3d 164 (4th Cir. 1998), the court held "the question of whether the LHWCA applies to a work related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. Underlying the court's ruling was its acknowledgement that Shives would then proceed "through the administrative process before the Department of Labor with his protectively filed LHWCA claim." *Id.* at 171.

Further, the Fourth Circuit's decision not to recognize the already existing "constitutional questions" exception to 28 U.S.C. § 1447(d) conflicts with *Johnson v. Robison*, 415 U.S. 361, 366 (1974), in which this Court rejected a "contention that [38 U.S.C.] § 211(a) [which prohibits judicial review of decisions of the Veterans' Administrator] bars federal courts from deciding the constitutionality of veterans' benefits legislation." This Court explained that such a construction of a legislative bar to judicial review "would, of course, raise serious questions concerning the constitutionality of § 211(a), and in such case 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided.'" *Id.* at 366-67 (footnote and internal citation omitted).

III. The Decision of the Fourth Circuit Conflicts with Both Congressional Intent and the Mandate of This Court that the Department of Labor Should Determine DBA Coverage in the First Instance.

The private federal contractor and DBA underwriting industries rely on the uniform and informed administration of the DBA that the Department of Labor provides today and has provided for the last 65 years. In performing its Congressionally-mandated responsibilities, the Department of Labor enables DBA underwriters to provide the critical cover of workers performing in the interests of the United States through its overseas contracts. The exclusivity provision of the DBA expressly voids concurrent jurisdiction with any state as to the compensation obligations of a DBA employer, and further makes clear that, statutorily, a state court or agency is prevented from involvement in the determination and scope of DBA jurisdiction. 42 U.S.C. § 1651(c). That the DBA provides a thorough framework for adjudication and administration solely under federal, and not state, review is also made clear by the statute's claim filing provisions, 33 U.S.C. § 913(a), notice, investigation and hearing provisions, 33 U.S.C. § 919, and jurisdiction-vesting provisions, 33 U.S.C. § 939(a).

There have been over 5,000 claims filed for injury and death under the DBA since the inception of the Iraq and Afghanistan wars. The Department of Labor has administratively handled each and every one of these claims and has made rulings as to cover in the first instance. In no claim has a state court had any involvement whatsoever in the determination of DBA cover. Rather, such issues have been solely determined by federal agencies and courts.

In fact, Blackwater itself has had 152 claims for injury and death filed in the Department of Labor by its workers. This number includes the claims of Zovko, Helvenston, Batalona and Teague. In every one of these cases, DBA benefits have been paid by and on behalf of Blackwater and accepted by the claimants with the approval and acknowledgement of the Department of Labor.

The Department of Labor has issued compensation orders and awards in nine of the death claims filed on behalf of Blackwater workers, including Zovko. In so doing, the Department of Labor has accepted the Blackwater security contracts to be within DBA cover.

In addition to the Department of Labor's finding of DBA cover in the Zovko claim, the Department of Labor has addressed, and continues to address, the issue of DBA cover and the issuance of compensation orders in the DBA claims of Teague, Helvenston and Batalona.

In his July 24, 2006 Order of Remand in the matter of Rhonda Teague (Widow) v. Blackwater Security Consulting, LLC, *et al.*, No. 2006-LDA-16, Administrative Law Judge ("ALJ") Richard D. Mills found that, "Employer [Blackwater] is correct in arguing that since no issues are at issue and since all benefits owed have been paid and are still being paid to Claimant [Rhonda Teague, widow of Michael Teague], I agree with Employee's position that under the circumstances of this case, the notifying of the [district] director of the withdrawal of controversion is mandatory." *Teague*, No. 2006-LDA-00016 (July 24, 2006) (ALJ). ALJ Mills concluded, "the district director shall then proceed to dispose of the case." In the Brandon Teague claim, the Department of Labor, through its District Director, has issued a memorandum directing

DBA benefits to continue to be made, and in the Rhonda Teague DBA claim has issued a memorandum affirming the payment of benefits and a prior recommendation of DBA cover.

The DBA claims of Helvenston and Batalona are currently before the Benefits Review Board ("BRB") of the Department of Labor. In these two consolidated matters, ALJ William Dorsey has issued a number of orders relating to DBA coverage for both Helvenston and/or Batalona, including:

- a December 28, 2005 Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Dec. 28, 2005) (ALJ), in which ALJ Dorsey observed that, "[i]f it applies, the [Defense Base] Act is the exclusive remedy for the decedent's survivors," citing 42 U.S.C. § 1651(c);

- a February 6, 2006, Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Feb. 6, 2006) (ALJ), in which Judge Dorsey wrote, "The Fourth Circuit's decision about which trial court will entertain the wrongful death action has no effect on the coverage issue. This is the appropriate forum to determine disputes about whether the decedent was:

  - an 'employee' as the Act uses the term in 42 U.S.C.A. § 1651(a), and (or)

  - engaged in activities the Act covered when he died. *See* 42 U.S.C.A. § 1651(a)(1) to (6)"; and

- a March 23, 2006, Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Mar. 23, 2006) (ALJ), after an initial round of discovery, in which Judge Dorsey observed "that

> coverage under the [Defense Base] Act has been conclusively established by the admissions the Claimant[s] sought."

Finally, the Fourth Circuit decision conflicts with the doctrine of primary jurisdiction pending determination of DBA cover by the Department of Labor. In *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956), this Court reversed the lower court's decision and in a detailed analysis set forth that in relevant circumstances "the judicial process is suspended pending referral of such issues to the administrative body for its views."

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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